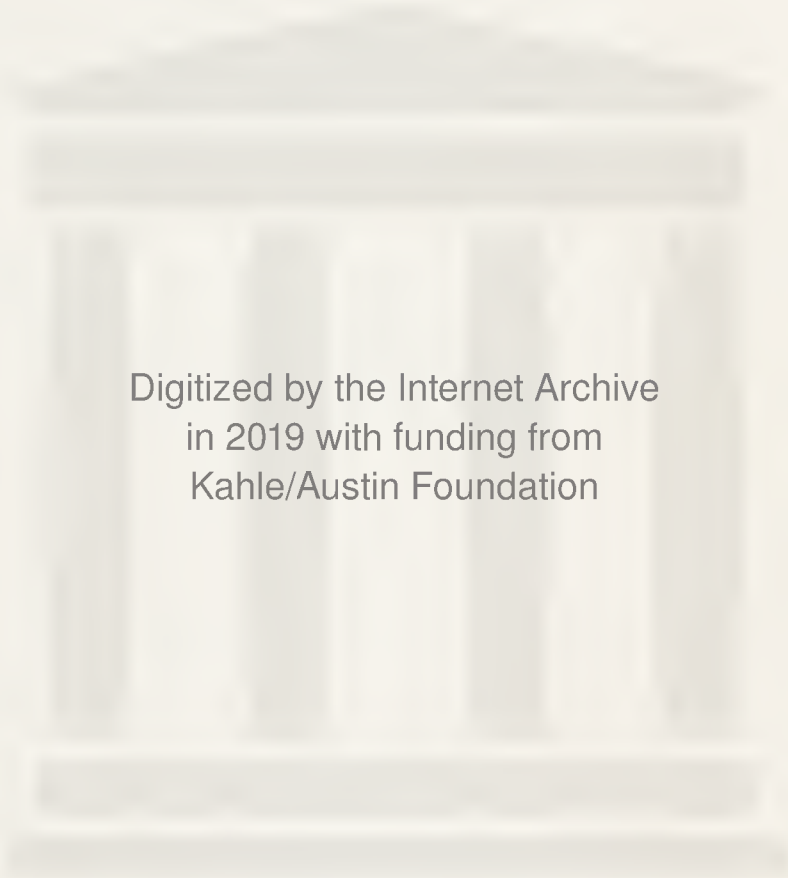

CANADA AS A POLITICAL ENTITY

BY

ALEXANDER OBERLANDER POTTER, M. A.

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PREFACE

The statements that the "Dominions have passed from the colonial status and are now free self-governing and sovereign states under a common sovereign, on an equality with the Mother Country,"[1] and, "practically speaking we are a colony to-day, dependent on the Empire, and we cannot be anything else so long as the Empire exists,"[2] illustrate the extremes of opinion with regard to Canada's political status. When such a conflict of opinion exists among members of the Canadian House of Commons it is not surprising that among the inhabitants of Canada generally, there is a lack of knowledge concerning Canada's precise political status. Nor is it astounding that in other countries there is a lack of appreciation of that status.

This state of affairs is largely due to the fact that the constitutional relations between Canada and the United Kingdom were not stated in detail when the Dominion of Canada was formed, but they were allowed to develop through the years. The development of these constitutional relations was accellerated by the Great War to such an extent that it became difficult to designate Canada's exact status.

This study is an attempt to indicate the political status which Canada enjoys at present. Of what has been written on this subject, much was with the avowed object of further-

[1] Mr. Rowell, Unrevised Hansard, Vol. LVI, No. 5, p. 125.
[2] Mr. Fielding, Unrevised Hansard, Vol. LVI, No. 45, p. 2477.

ing a certain "ultimate destiny" for Canada — whether that destiny be dependence or independence, federation with the other parts of the British Empire or partnership in an association of equal nations. Realizing this, the author has endeavored to pursue this study in an impartial manner, submerging any personal opinions or desires he may have as to Canada's "ultimate destiny." He has considered Canada's position from various points of view in an endeavour to indicate as accurately as possible the status of Canada as a political entity.

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A. O. P.

New York, April 3, 1922.

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INTRODUCTION

1. Entity

An entity, if the derivation of the word is considered, means a thing that exists.[1] Thus, a debating society, a nomadic tribe, and a community, whether civilized or uncivilized, are entities. If, in the debating society a political consciousness is evolved and that society organizes itself into a political party it becomes a political entity.[2] Tammany, the Liberal Party, Sinn Fein, and the Republican Party, are political entities. An organized community with a form of government also is a political entity. The United States, Ontario, France, Egypt, New South Wales, Switzerland and New York are political entities. Thus, when a group of persons is banded together politically, or for political action, a political entity may be said to exist. This term is so inclusive that it will not be gainsaid that it can be used to describe Canada. Because of this very comprehensiveness, and because it was not desired to start from

[1] Low Latin "entitas" from the Latin "ens," "entis," being the present participle of the verb "esse"—"to be."

[2] Graham Wallas, "Human Nature in Politics," p. 82; "The party is, in fact, the most effective political entity in the modern national state."

any controversial assumption, the title "Canada as a Political Entity" was chosen for this study. To have studied "Canada's International Status," "Canada as a Nation," or "Canada's Colonial Status," would have implied that Canada has an international status, or that it is a nation, or that it is a colony, — propositions which, in turn, might have been vehemently controverted; whereas the assertion that Canada is a political entity will not meet with contradiction. The object of this study is not to demonstrate the simple fact that Canada is a political entity, but to examine its status as such an entity.

There are many kinds of political entities. To consider all of them is not necessary, but there are some so similar to Canada that they can be easily confused. Indeed, many people, seizing on this resemblance, endeavor to fit Canada into one or the other of these categories. While it is not desired to enter into a lengthy discussion of these like entities, it has nevertheless been deemed advisable, in order to avoid confusion and to see wherein they differ from Canada, to give some attention to their exact nature. The first kind to be considered is the colony. The fact that "Canada" was once a "colony" has caused an association between the two words that is difficult to overcome. Even at this late date, officially and unofficially, Canada is often referred to as a colony. This incorrect appellation has created a false idea of the term, because, instead of ceasing to call Canada a colony as soon as it had discarded colonial status, officials, students and laymen persisted in keeping the name, and, at the same time, they endeavored to change its meaning so that it could be applied to Canada.

2. Colony

A colony is not merely a detached settlement dependent upon the parent community, it is an integral part of the state to which it belongs,[1] and as such it can have no international relations.[2] It derives all its powers from a superior body, and it can function only through the approval of that superior body.[3] The fundamental implication is that it is governed directly or indirectly by the central government for the benefit of the Mother Country.[4] It is not supreme in its domestic affairs;[5] even its "financial system must always be adapted to this relation of dependence."[6] The one thing, above all, that a colony cannot possess is sovereignty.[7] To speak of "Sovereign Colonies"[8] is as contra-

[1] Jellinek, "Allgemeine Staatslehre," p. 637; Moore, "Digest" I, p. 18; Phillimore, "Commentaries on International Law," p. 79.

[2] Oppenheim, "International Law," Vol. I, p. 162; Phillimore, op. cit., p. 82.

[3] Jellinek, op. cit., p. 639.

[4] For discussions of "Colony" see Leroy-Beaulieu, "De la colonization chez les peuples modernes"; Sir George C. Lewis, "Essay on the Government of Dependencies"; Pierre Aubry, "La colonization et les colonies," particularly Chapter III, "Theorie de la colonization"; Heeren, A. H. L., "History of the Political System of Europe and its Colonies," Leacock, "Elements of Political Science," Chapter on Colonies. The latter author, after giving a history of earlier colonial principles, intimates that the change in colonial policy was occasioned by a desire to "give the colonies a sound political education in the methods of responsible government, and when the destined hour came to let them depart in peace." (p. 271). In other words, the object the statesmen of the Mother Country had in mind when they permitted the colonies to exercise functions incompatible with the idea of "colony" was a desire to elevate them from a colonial status.

[5] Oppenheim, op. cit., p. 162.

[6] Reinsch, P. S., "Colonial Administration," p. 81. On page 92 Reinsch states that the "self-governing colonies of Great Britain" are really not colonies.

[7] Jellinek, op. cit., p. 637; Phillimore, op. cit., p. 79; Oppenheim, op. cit., p. 162; Hershey, "Essentials of International Public Law," p. 102; see also note 4 on previous page.

[8] Baty, T. "Sovereign Colonies," Harvard Law Review, June, 1921.

dictory as it would be to refer to a married bachelor. If it is sovereign it is not a colony; if it is a colony it cannot be sovereign. The two concepts are fundamentally opposed. Although illogical, this phrase "Sovereign Colonies" indicates not only the tenacity with which the old word lingers on, but it is illustrative of the anomalies that apparently exist in the relations between Canada and the United Kingdom.

Words should mean something; the object of their use is to convey an impression. What political idea is conjured up by the word "colony"—that of a self-reliant, practically independent country, or of a subservient possession? Undoubtedly it is the latter impression that is meant to be conveyed and that actually is conveyed. The idea expressed by "colony" is altogether incompatible with the position of Canada. As applied to Canada, the term colony is merely a "reminiscent misnomer."

3. Vassal State

Neither is Canada a Vassal State under the suzerainty of Great Britain. Baty in his article on "Sovereign Colonies" suggests that the whole of the old learning regarding the relations of vassals to suzerains will become of the first importance in determining the legal relations of the colonies to the United Kingdom. Hall describes states under the suzerainty of others as "portions of the latter which during a process of gradual disruption or by the grace of the sovereign have acquired certain of the powers of an independent community such as that of making commercial conventions, or of conferring their exequatur upon foreign

consuls.''[1] It would seem, especially when considering that part of the statement following the phrase ''by the grace of the sovereign,'' that the author had the British Dominions in mind when the passage was written. Concerning suzerainty Klüber says: ''when one state is dependent on another in the exercise of one or more of the essential rights of sovereignty, but is otherwise free it is called dependent or 'mi-souverain.' ''[2]

In Moore, ''Digest'' Vol. 1, § 13, we read: ''A state which is not a member of a composite state, but which, while it retains a certain personality in international law, is subject to the authority of another state in its sovereign relations, is commonly called a semi-sovereign state. The paramount state is called the 'suzerain', and its relation to the subject state is described as suzerainty.'' According to Oppenheim ''Suzerainty is by no means sovereignty. If it were, the vassal state would not be sovereign in its domestic affairs and could never have any international relations whatever of its own.'' Westlake criticizes the use of suzerainty and vassal thus: ''Superior and inferior or protecting and protected states are sometimes called suzerain and vassal, but this is a loose diction, and should be avoided. 'Suzerain' and 'vassal' are terms of mediaeval origin, and strictly imply two relations which the feudal system in its full development united. One was the personal relation of fidelity, binding the man to the defence of his lord and the

[1] Hall, W. E. ''International Law''—7th edition. Ed. by A. Pearce Higgins, p. 29.

[2] Klüber, J. L., ''Droit des gens moderne de l'Europe,'' p. 24; see also McIlwraith ''The Rights of a Suzerain,'' Law Quarterly Review, 1896; Stubbs, ''Suzerainty, Mediaeval and Modern,'' Law Magazine and Review, series 4, Vol. VII, p. 279.

lord to the protection of his man. The other was the proprietary and especially feudal relations by which the vassal's fief might be bound to make certain payments to the suzerain, or to render to him certain military or other services, and was subject to forfeiture on the vassal's breach of fidelity or failure to perform the attached obligations, and to escheat on failure of his heirs of the particular description pointed out by the tenure, but in the meantime was his property."

A vassal state is not a part of the suzerain state, and it can have a separate international existence;[1] Canada is a part of the composite state known as the British Empire, and it has an international identity only through its position within that state. Even though relations between suzerain and vassal could be described in such a way as to make it appear that Canada is a vassal state,[2] nevertheless the words themselves would convey an impression unwarranted by actual conditions. The idea expressed by vassal is one of subjection and inferiority. To imply that Canada is an inferior state subject to the United Kingdom would be erroneous. That, however, is the implication contained in any statement that the former self-governing colonies are vassal states.

4. State

A third kind of political entity that must be noted is a

[1] Oppenheim, op. cit., p. 127; Moore, "Digest" Vol. 1 § 13; Westlake, "Peace," p. 26.

[2] Hall, op. cit., p. 29.

state.[1] Certain elements are essential to the concept of state; they are, a people, a territory, a government, and a degree of sovereignty. Political theorists, who maintain that sovereignty is indivisible, hold that a political entity in order to be a state, must possess complete sovereignty. It may be noted immediately that according to this concept Canada is not a state. Laying aside arguments as to actualities, it will be recognized that theoretically Canada is not sovereign and hence according to the definition of political theorists, not a state. The international law concept of state may cause a little more difficulty, because international jurists, discarding theoretical discussion, hold that sovereignty is divisible, and that a political entity may be a state without possessing complete sovereignty.[2] The criterion of international jurists does not seem to be so much whether

[1] For discussions of state see Buntschli, "Völkerrecht," Sec. 79; Bodin, "De la Republique," Bk. I, Chaps. 1, 8; Crane, R. T., "The State in Constitutional and International Law"; Hall, op. cit., pp. 17-29; Jellinek, "Das Recht des Modernen Staates," Book II, pp. 123-368, and "Die Lehre von Staaten Verbindungen"; Klüber, op. cit. § 20; Leacock, op. cit. Chap. I; Oppenheim, op. cit., pp. 124-127; Phillimore, op. cit., p. 81; Westlake, op. cit., pp. 1-5; Willoughby, W. W., "Nature of the State."

[2] Oppenheim, op. cit., p. 133, "Under these circumstances those who do not want to interfere in a mere scholastic controversy must cling to the facts of life and the practical, though abnormal and illogical, conditions of affairs. As there can be no doubt about the fact that there are semi-independent states in existence, it may well be maintained that sovereignty is divisible."

Moore, "Digest" I, § 4, p. 18; "These differences"—(whether sovereignty is divisible or not)—"belong rather to the domain of political science than to that of international law. As international law deals with actual conditions, it recognizes the fact there are states not in all respects independent that maintain international relations, to a greater or less extent, according to the degree of their dependence. Such states are generally called semi-sovereign."

one political society depends upon another for the conduct of certain of its functions, but rather whether it has an existence separate from other political entities. The test is this: "Is the political entity and its territory a part of a larger one, or not?" Irrespective of the degree of independence which Canada enjoys, it is a part of the British Empire, a part of a state; it enjoys an international existence only as a part of that state. Thus, being a part of a larger political entity, Canada is not a state according to the international law concept.

5. Nation

Another entity that must be discussed is the one called a nation. This term has several widely accepted meanings. In a legal sense it is used as a synonym for state,[1] in an ethnical sense it is carefully distinguished from state,[2] and finally in a political sense it is used to signify an entity that possesses all or nearly all the marks of a state.[3]

Canada, strictly speaking, is not a state.[4] Therefore it cannot be a nation in the legal sense, where the word is used synonymously with state.

Is it a nation in the ethnical sense? When a group of people, speaking the same language, have a common civil-

[1] Crane, op. cit.; Moore, "Digest" Vol. 1, p. 3.

[2] Willoughby op. cit., pp. 9-15; Bluntschli, "Allgemeine Staatslehre," Bk.11, pp. 91-92.

[3] Hall, H. D. "British Commonwealth of Nations"; cf. also, Willoughby and Rogers, "Problem of Government," p. 16 and Haines and Haines, "Principles and Problems of Government," p. 50-51.

[4] Supra, Sec. 4.

ization, common aspirations and customs, and are descended from a common racial origin, a nation, ethnically conceived, is said to exist.[1] At the present time Canada does not satisfy any of these requisites for a nation. There is neither common racial origin nor common language; neither common customs nor common aspirations. The racial origin of Quebec is French, of British Columbia, English. The natives of Ontario are, for the greater part, descendants of stock emigrating from the British Isles, while in the population of the Prairie Provinces there is a large element which in origin is American and European. French and English are both official languages in Canada; there are large groups of the population who speak the one to the exclusion of the other. Aspirations, also, are very different, some groups aspiring to independence, others desiring closer coöperation with the various component parts of the Empire. Then there are those who, favoring neither of of the above extremes, pursue a *laissez faire* policy, while there is a very large group, the members of which are not quite certain what Canada's position is at present, or what it might be in the future, but whatever it is, whatever it will be, they are satisfied, they are "loyal." In the ethnical sense of the word, Canada it not a nation.

But the term nation is freely used to designate Canada's status. When Canadian statesmen say, "Canada is a

[1] cf. Willoughby, op. cit., p. 13; Burgess, "Political Science and Constitutional Law," Vol. I, Chap. 1; Lecky, "Democracy and Liberty," Vol. I, p. 471-478; Wheaton, "International Law," p. 33; Leacock, "Elements of Political Science," p. 17; Bluntschli, "Allgemeine Staatslehre," Bk. II, p. 96.

nation,''[1] and ''we have the status of a nation,''[2] they are not declaring the legal independence of Canada by using a word synonymous with state,[3] neither can they intend to assert that Canada is a nation according to the ethnical concept. They are using the word in the political sense. They are using it to describe an entity that does not possess all the marks of a state.[4] While Canada may be termed a nation in the political sense that designation should be avoided because owing to its various meanings the use of nation as applied to Canada is confusing. The word may be employed in one sense and be accepted in another. There is a great possibility that there will not be a meeting of minds, that in the case of a controversy the contending parties will not share the same concept of nation. Such a condition only leads to further bewilderment. Because of its several meanings the use of the word nation as a designation for Canada is unsatisfactory.

[1] House of Commons Debates, Canada, Official Report—Unrevised Edition (hereinafter cited as ''Hansard''; the Revised Edition will be cited as ''Revised Hansard'') Vol. LVI, No. 33, p. 1588, Premier Meighen:—''Canada is unquestionably a nation, and something more than a nation. It enjoys a status and rights in the world beyond those which other nations of its age and strength enjoy.''

[2] Hansard, Vol. LVI, No. 45, p. 2494, Hon. W. L. Mackenzie King (at that time Leader of the Opposition, but now Prime Minister); ''If we approach the matter from the standpoint of constitutional authority, then I agree with him, that we have the status of a nation.''

[3] It must be kept in mind that ''state'' is used in the strict scientific sense meaning an independent political entity, and not in the general sense which includes a political subdivision of a federation or a confederation.

[4] cf. the decision of Chief Justice Marshall in ''Cherokee Nation v. Georgia'' (cited Moore, ''Digest'' Vol. 1 § 15) in which he held that an Indian tribe is not a foreign state. He denominated such tribes as ''domestic dependent nations'' occupying a territory to which the United States asserts a title independent of their will.

6. Dominion

If Canada is no longer a colony and has not become a state, if to call it a vassal state is incorrect, and if to term it a nation is unsatisfactory because it is confusing, is it then necessary to invent a new term in order to supply a name for the political entities of which Canada is one? Fortunately that is not necessary. In 1867[1] a suitable term crept, almost unnoticed, into the terminology of political science. That term is the word "Dominion." For forty years it was applied to Canada until in 1907 at the Imperial Conference it was declared to be the official designation of the "colonies with responsible government."[2] Still, writers persist in calling Canada a colony. Baty, in his "Sovereign Colonies" brushes aside the term Dominion in a foot-note. He contends that "Dominion is a misleading and ambiguous word, the sole object of which is to gratify the *amour propre* of large colonies. It is constantly being confused with 'dominion' in the wide and proper sense of territorial possessions. Its use dates from a very recent period. As a proper noun it is the special title of Canada,—of course it goes back to 1870 at least,—but as a common noun, meaning 'large self-governing colonies,' it would be surprising if an instance could be found of it antedating the twentieth century. Its official use is very recent indeed."

This inclination to refrain from using the term "Dominion" and to substitute some other word which has a more definite

[1] Keith, A. B., "Dominion Home Rule in Practice," p. 7.
[2] Keith, op. cit., p. 7; and "Imperial Unity," p. 9.

meaning is caused by the fact that a clear conception of the word Dominion as a term of political science is lacking. Premier Lloyd George, defending the Irish Agreement before the House of Commons of the United Kingdom, spoke as follows: "What does Dominion status mean? It is difficult and dangerous to give a definition. When I made a statement at the request of the Imperial Conference to this House as to what had passed at our gatherings I pointed out the anxiety of all the Dominion Premiers not to have any rigid definition. That is not the way of the British Constitution. We realize the danger of rigidity, the danger of limiting our Constitution by too many finalities. Many of the Premiers delivered notable speeches in the course of that conference, emphasizing the importance of not defining it too precisely."[1] Precise definition is not conducive to gradual change; it is undesirable because dominion status is continually changing.[2] Discarding exact definition, there is no reason why there should not be a fairly clear concept of the term Dominion, and a recognition of the theory behind the evolution of the concept. How can this be accomplished?

Canada has always been the Dominion "par excellence."[3]

[1] New York Times, December 15, 1921.

[2] That some of the Irish statesmen recognize the fact that Dominion Status is evolutionary, while others are evidently laboring under the delusion that Dominion Status is definite and unchangeable, is shown by the following extract from the debate in the Dail; (New York Times, January 8, 1922) "Boland asked if this treaty was a final settlement. 'It is not,' replied Collins in a loud voice. 'In that case,' said Boland, 'world opinion would be against the Irish if they took the treaty with a mental reservation and then broke it.'"

[3] Keith, "Imperial Unity," p. 9.

Striking official confirmation of this is to be found in the Irish Agreement which selects Canada as the model to be followed in determining the nature of Dominion Status. Article II of the Agreement giving Ireland Dominion status stipulates:[1] "Subject to provisions hereinafter set out, the position of the Irish Free State in relation to the Imperial Parliament, the Government and otherwise shall be that of the Dominion of Canada, and the law, practice and constitutional usuage governing the relationship of the Crown or representative of the Crown and the Imperial Parliament to the Dominion of Canada shall govern their relationship to the Irish Free State." Article III provides that: "A representative of the Crown in Ireland shall be appointed in like manner as the Governor General of Canada and in accordance with the practice observed in making such appointments." Thus by studying Canada's status as a political entity an idea of the nature of Dominion status can be built up.

7. Sovereignty

Before entering upon an examination of Canada's status, attention must be given to the term sovereignty. Concerning sovereignty Willoughby writes that it "is safe to say that there exists no other term in political science, regarding whose signification there exists such confusion and contradiction of thought, and in regard to which such an amount

[1] New York Times, January 8, 1922.

of dogmatism has been preached.''[1] In order to understand clearly and to grasp fully the significance of the subsequent chapters it is necessary that some order be brought out of this confusion and contradiction of thought concerning sovereignty.

First, the distinction between external and internal sovereignty must be noted.[2] Hershey asserts that sovereignty has a double aspect—an external as well as an internal face.[3] Moore, ''Digest,'' Vol. I, § 4, citing Westlake, states that: ''sovereignty is the supreme power by which any state is governed. This supreme power may be exercised either internally or externally. Internal sovereignty is that which is inherent in the people in any state, or vested in its ruler by its municipal constitution or fundamental laws.....External sovereignty consists in the independence of one political society, in respect to all other political societies.'' Internally, a political entity may be sovereign and externally not sovereign; that is, as far as internal affairs are concerned that entity may posses the supreme will, the supreme power, to do as it sees fit, whereas in its external affairs it may be limited by a power, a will, superimposed upon it.

Closely related to this double aspect of sovereignty is the distinction between legal sovereignty and actual or

[1] Willoughby op. cit., p. 185; see also Oppenheim op. cit., p. 129, and Crane, op. cit., p. 7.

[2] Klüber, op. cit. 21; Wheaton, op. cit., p. 35; Esmein, ''Droit constitutionnel,'' p. 1; Moore, ''Digest,'' Vol. I, §4, p. 17; Crane, op. cit.; Jellinek, ''Staatenverbindungen,'' pp. 36-58.

[3] Hershey, op. cit., p. 100.

political sovereignty.[1] Dicey writes: "It should, however, be carefully noted that the term 'sovereignty,' as long as it is accurately employed in the sense in which Austin sometimes uses it, is a merely legal conception, and means simply the power of law-making unrestricted by any legal limit. If the term 'sovereignty' be thus used, the sovereign power under the English constitution is clearly 'Parliament.' But the word 'sovereignty' is sometimes employed in a political rather than in a strictly legal sense. That body is 'politically' sovereign or supreme in a state the will of which is ultimately obeyed by the citizens of the state. In this sense of the word the electors of Great Britain may be said to be, together with the Crown and the Lords, or perhaps, in strict accuracy, independently of the King and the Peers, the body in which sovereign power is vested. For, as things now stand, the will of the electorate, and certainly of the electorate in combination with the Lords and the Crown, is sure ultimately to prevail on all subjects to be determined by any British government. The matter indeed may be carried a little further, and we may assert that the arrangements of the constitution are now such as to ensure that the will of the electors shall by regular and constitutional means always in the end assert itself as the predominant influence in the country. But this is a political, not a legal fact. The electors can in the long run always enforce their will. But the Courts will take no notice of the will of the electors. The judges know nothing about any will of the people except in so far as that will is expressed by an Act of Parliament, and would never suffer the validity of a statute to be questioned on the ground of its having been passed or being kept alive in opposition to the wishes of the electors. The political sense of the word 'sovereignty' is, it is true, fully as important as the legal sense or more so. But the two significations, though intimately connected

[1] Dicey, A. V., "Law of the Constitution," Eighth Edition, (cited as "Dicey") pp. 68-73; Lord Bryce, "Studies in History and Jurisprudence," (cited as "Bryce") Vol. II, p. 505 et seq.

together, are essentially different, and in some part of his work Austin has apparently confused the one sense with the other.''[1]

8. Legal Power Controlled by Constitutional Right

In Great Britain the King in Parliament is the legal sovereign; the electorate is the actual or political sovereign. Through conventions of the constitution the political sovereign restricts the legal sovereign[2], and thus has arisen the theory in British Constitutional practice that legal power is controlled by constitutional right.[3] The following extract from the debate in the Canadian House of Commons on April 21, 1921, is interesting and enlightening:[4] ''Mr. Fielding: Could not the Parliament at Westminster write the Constitution of Canada off the statute book almost by a single stroke of the pen?

Mr. McMaster: Then we shall make another for ourselves.

Mr. Rowell: I say without any hesitation, no. I say it is

[1] Dicey, pp. 70-72.

[2] Dicey, p. 424. ''Having ascertained that the conventions of the constitution are (in the main) rules for determining the exercise of the prerogative, we may carry our analysis of their character a step farther. They have all one ultimate object. Their end is to secure that Parliament, or the Cabinet which is indirectly appointed by Parliament, shall in the long run give effect to the will of that power which in modern England is the true political sovereign of the State—the majority of the electors or (to use popular, though not quite accurate language) the nation.'' And on page 426, ''The conventions of the constitution now consist of customs which (whatever their historical origin) are at the present day maintained for the sake of ensuring the supremacy of the House of Commons, and ultimately, through the elective House of Commons, of the nation. Our modern code of constitutional morality secures, though in a roundabout way, what is called abroad the 'sovereignty of the people'.''

[3] Dicey, p. 424-426; Bryce, p. 515 et seq.

[4] Hansard Vol. LVI No. 45, p. 2480.

clear as any constitutional principle in British Constitutional practice that while the authority for legislation is still in the Imperial Parliament, they have no constitutional right to repeal the British North America Act. They have no more right to pass, for instance, a customs law for Canada than we have to pass a law regulating the running of tramways on the streets of London—absolutely none.

Mr. Fielding: I do not dispute that for a moment. But it is not a question of the legal right, we are talking of the power of Parliament, and the Parliament at Westminster can wipe this Constitution off the slate if it chooses.

Mr. Rowell: If my hon. friend has followed constitutional development at all, I do not think he will dispute the proposition that legal power is controlled by constitutional right. My hon. friend may say that His Majesty the King has the power to veto every piece of legislation passed by the Imperial Parliament. He has the legal authority to do that, but not the constitutional right. If he undertook to veto all the legislation passed by the British Parliament, to set at defiance the will of that Parliament, I am afraid, with all respect, he would suffer the same fate as one of the sovereigns of England did many years ago. In other words, you cannot settle these questions on the basis of legal power, you must consider the constitutional rights." This proposition,that legal power is controlled by constitutional right, has also been affirmed by Sir Robert Borden.[1]

9. Substance and Form

The operation of this theory has caused a great divergence between substance and form. The old legal forms are still retained, but constitutional development has changed the substance. The Minister of Justice, Mr. Doherty, speaking in the Canadian House of Commons on April 28, 1921, said:

[1] Hansard Vol. LVI, No. 45, p. 2519.

"Now let me say to my hon. friends that in many of our differences upon the subject of Canada's nationhood we have differed because of this fact, that on one side we are looking at substance and on the other side we are looking at form. Those who say that His Majesty acts upon the advice of his Canadian ministers in matters of this sort base that statement upon the fact that the advice really comes from the Canadian ministers. On the other hand, those who say that he acts through his British ministry rest their case upon the fact that the advice, being there in writing, is transmitted through the British ministry. Now let me say to the hon. gentlemen, who in these forms, see such serious obstacles, that the very last thing that will disappear, in order that we may have complete nationhood, is form. Do hon. gentlemen recognize that if we looked at form we should have to conclude that we are living under an autocratic government? Yet all of us agree that there is no more democratic government in this world. We have the forms that have survived from the old colonial days, but we have the substance of a nation standing on a foot of equality, whose representatives tender their advice to its king, who acts on that advice."[1] And again, "Perhaps it will be permissible for me to say that in officialdom, which counts for a great deal on the other side, you find an aversion to calling things by their right names. They have a love for hanging on to an old name, even when the thing itself has ceased to exist. Possibly after a thing has been gone for years, even for centuries, the name will still be there."[2] This difference between substance and form is naturally quite misleading.[3] But just as political sovereignty controls the exercise of legal sovereignty, just as consti-

[1] Hansard Vol. LVI, No. 50, p. 2814.

[2] Hansard Vol. LVI, No. 19, p. 815.

[3] Hansard Vol. LVI, No. 50, p. 2814; Mr. Doherty, "There is nothing more misleading that I know of in the whole field of formal phraseology, than the terms that are used with regard to the British system of government."

tutional right overrides legal power, so does substance supersede form.

In order to form a clear and accurate conception of Canada's status as a political entity it is necessary, in examining that status, to keep these points in mind: 1, Sovereignty has both an internal and an external aspect; 2, Political sovereignty controls the exercise of legal sovereignty; 3, It is an accepted theory of British constitutional practice that legal power is restricted by constitutional right; 4, Where there is a difference between substance and form, the former is the more accurate criterion of actual constitutional relations.

CHAPTER II

INTERNAL GOVERNMENT

10. Titular head

The titular head of the Dominion of Canada is, "His Majesty the King of the United Kingdom of Great Britain and Ireland of the British Dominions beyond the Seas, Emperor of India."[1] Legally, "the Executive government and authority of and over Canada" is vested in him. (British North America Act, 1867, Sec. 9.) But, just as in England, so also in Canada, the legal power of the King has been abridged and limited through the development of the Constitution. It is this development in the internal government of Canada that will be considered in this Chapter.

For obvious reasons the King is prevented from being present in Canada to exercise any powers he may have as titular head. To exercise these powers, and to represent him, His Majesty appoints a Governor-General.[2] That is the

[1] Concerning the indivisibility of the Crown see Lefroy "Constitutional Law in Canada," p. 59 and p. 167, note 36 (cited as Lefroy).

[2] For "Letters Patent Constituting the Office of Governor-General and Commander-in-Chief of the Dominion of Canada," "Instructions to the Governor-General," and "Form of Commission Appointing Governor-General," see Keith "Responsible Government in The Dominions" (cited as "R. G. in D.") p. 1561.

form; actually the Governor-General is appointed by the Government of Great Britain after consultation with the Government of the Dominion.[1] The amount of influence exerted by Canada during the course of this consultation is problematical. However, it is very doubtful if the Government of Great Britain would insist upon sending as Governor-General a man whose appointment was opposed by Canada. The probability that Canada would refuse to accept such an appointee is sufficient guarantee that such an attempt will never be made by a discreet British Government.

Before assuming office each Governor-General is provided with instructions which are to govern him in his relations with the Dominions. From the year 1867 to 1878 these Instructions forbade the Governor-General to give his assent to any bill providing for divorce, granting land or money or gratuity to himself, making paper or any other currency legal tender, imposing differential duties, containing provisions contrary to Treaty obligation, interfering with the discipline or control of the naval or military forces of the Crown in Canada, interfering with the Royal Prerogative, or the rights and property of British subjects outside of Canada, or with the trade and shipping of the United Kingdom and its dependencies, containing provisions to which the Royal assent has already been refused or which have

[1] Scott, "Canadian Constitution," p. 140 (cited as Scott), Keith "Dominion Home Rule in Practice," p. 9, and also "R. G. in D." p. 83. This latter reference also indicates the part played by the Crown in making a selection.

been disallowed.[1] Acting on these Instructions, twenty-one bills were reserved. This naturally became a matter of great concern to the Government of Canada. Their view, as expounded by Mr. Edward Blake, Minister of Justice, was that the Governor-General should occupy a position similar to that of a constitutional monarch, acting solely upon the advice of his ministers, who, in turn, would accept full responsibility.[2] As a result of Mr. Blake's representations permanent general instructions, which satisfied the Canadian demands, were issued, October 5, 1878.

At present, the position of the Governor-General in Canada is similar to that occupied by the King in the government of Great Britain. [3] Being nominal head he takes no part in politics. "A Governor is now politically a cipher," Goldwin Smith wrote at the close of the last century, "he holds a petty court and bids champagne flow under his roof, receives civic addresses and makes flattering replies, but he has lost all power not only of initiation but of salutary control." While the Governor-General has been shorn of his powers, nevertheless it would be misleading to say that his duties are mainly social. There are important governmental functions that he must perform. He occupies the place of that detached, disinterested personage so

[1] Kennedy, "Documents of the Canadian Constitution" (cited as Kennedy "Documents") p. 696.

[2] Sessional paper number 13 of 1877.

[3] For position of Governor-General see Sir Robert Borden, "Canadian Constitutional Studies" (cited as Borden) pp. 61-64, "Appointed with the consent of the Canadian Government, he had become in effect a nominated President, invested with practically the same powers and duties in this country as those appertaining to the King in the British Isles."

necessary in a cabinet form of government, who acts as nominal head, and in whose name the government is carried on, thus giving a continuous administration in spite of cabinet changes. He summons the man who is to form a ministry and become Prime Minister. Here he exerts no personal choice, being obliged, both by custom and by necessity, to choose the leader with the largest parliamentary following. The Governor-General, with much pomp and ceremony, opens and closes parliament; he reads a "Speech from the Throne" prepared for him by the Cabinet. Acting upon their advice he approves and signs measures; proclamations are issued in his name. He is not present at Cabinet meetings, and takes no part in their deliberations. His participation in the government may, in fact, become so negligible as to make it necessary for the Government to remind the various departmental heads that the Governor-General should be informed concerning new policies before they are announced, so that he will not obtain his first intimitation of them from the public press. In reality he is a "constitutional monarch," acting upon the advice of his ministers,[1] who accept all responsibility for state action.[2]

But the influence of the Governor-General should not be minimized. Recognition here, a kind word there, can work wonders. The use to which a Governor-General puts his position naturally varies according to the men who occupy the office. In 1847 the Governor-General, Lord Elgin, wrote to the Colonial Secretary, Earl Grey: "I feel very strongly

[1] For the views of Mr. Blake see Keith "R. G. in D." pp. 158-163. Also Sessional Paper No. 13 of 1877.

[2] The Governor-General, however, unlike the King, "may be sued in contract or tort with regard to his private acts." Scott, p. 141.

that a Governor-General, by acting upon these views with tact and firmness, may hope to establish a moral influence in the province which will go far to compensate for the loss of power consequent on the surrender of patronage to an executive responsible to the local Parliament." The influence exerted may be great or small, it may be difficult to estimate,[1] nevertheless it is potential enough that it would be incorrect to say that the Governor-General is a mere figurehead. At one time the Governor-General of Canada possessed real power and authority. Through the years he was deprived of these powers one by one. Now, as far as the internal government of Canada is concerned, he is simply the nominal head of a country with a cabinet form of government.[2] He possesses no actual power, but, just as a forceful King can leave his mark on the history of the Empire, so is it possible for a Governor-General to exert an influence in the affairs of Canada that will be felt in varying degree.

11. The Cabinet

Article 11 of the British North America Act reads: "There shall be a Council to aid and advise in the Government of Canada, to be styled the King's Privy Council for Canada; and the persons who are to be Members of that Council shall be, from time to time, chosen and summoned by the Governor-General and sworn in as Privy Councillors, and Members thereof may be, from time to time,

[1] In this connection see Dicey, op. cit., pp. 457-459 on "Why is the personal influence of the Crown uncertain?"

[2] Regarding the Governor-General's veto power, see infra Chap. II, Sec. 13.

removed by the Governor-General." Article 13 reads: "The provisions of this Act referring to the Governor-General-in Council shall be construed as referring to the Governor-General acting by and with the advice of the King's Privy Council for Canada." The Canadian Privy Council is a large body consisting of all Cabinet Ministers, all former Cabinet Ministers and all other men who have been sworn in as Privy Councillors by the Governor-General. Every man who has been sworn in as a Privy Councillor remains one for life. Membership in the Council carries with it the title of Honorable. The Privy Council never meets as a body, all its functions are exercised by the Cabinet. The present Canadian Cabinet, under the leadership of Mr. W. L. Mackenzie King, consists of sixteen ministers with portfolios and two ministers without portfolios.

Ostensibly only advisers, the Cabinet actually conducts the Executive government of Canada.[1] Decisions reached in their deliberations are automatically approved by the Governor-General. They accept complete responsibilty for all acts taken in the name of the Governor-General. In the interim between sessions of Parliament they not only carry on the administration, but they also govern by means of Orders-in-Council. A Prime Minister and his cabinet remain in power as long as they are able to command the confidence of the House of Commons, to which they are immediately responsible.

[1] See Porritt, Chapter XIII for a detailed discussion of the Cabinet.

12. Parliament

The Executive government is conducted by the Cabinet, but all real power is exercised by Parliament or by its authority.[1] The Constitution of Canada, is not contained in one written document.[2] In principle it is similar to the Constitution of the United Kingdom. The Canadian Constitution includes the great constitutional documents, the large body of unwritten conventions, usages and understandings and the legal decisions which form a part of the Constitution of the United Kingdom. All these forms as important a part of the Constitution of Canada as does the British North America Act, 1867,—the fundamental law which governs the federation.[3]

Legally the Canadian Parliament is a non-sovereign body,[4] legal sovereignty residing in the Parliament of Great Britain. This omnipotence of the British Parliament, however, "though theoretically admitted, has been applied in its full effect only to the United Kingdom."[5] The Canadian Parliament represents the political sovereign in Canada—the electorate. As such it has continually encroached upon the legal sovereignty, until at the present time only a shadow

[1] The Canadian Parliament consists of an Upper House, the Senate, with 96 members, who are appointed for life by the Government, a Lower House, the House of Commons, with 235 members, elected by universal adult suffrage. For a description of the government of Canada, see Edward Porritt, "The Evolution of the Dominion of Canada."

[2] Riddell, W. R. "The Constitution of Canada," Lectures II, III, IV.

[3] Lefroy, p. 39.

[4] Scott, p. 1; Dicey, p. 100.

[5] Dicey, p. xxvii.

of the latter remains. Article 91[1] of the British North America Act provides that it shall be lawful for the Parliament of Canada "to make laws for the peace, order and good government of Canada in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater certainty, but not so as to restrict the generality of the foregoing terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all matters coming within the classes of subjects next hereinafter enumerated, that is to say:

"1. The Public Debt and Property:
"2. The regulation of Trade and Commerce:
"3. The raising of money by any mode or system of Taxation:
"4. The borrowing of money on the Public Credit:
"5. Postal Service:
"6. The Census and Statistics:
"7. Militia, Military and Naval Service, and Defence:
"8. The fixing of and providing for the Salaries and Allowances of Civil and other Officers of the Government of Canada.
"9. Beacons, Buoys, Lighthouses, and Sable Island:
"10. Navigation and Shipping:
"11. Quarantine and the establishment and maintenance of Marine Hospitals:
"12. Sea Coast and Inland Fisheries:
"13. Ferries between a Province and any British or Foreign Country, or between two Provinces:
"14. Currency and Coinage:
"15. Banking, Incorporation of Banks, and the issue of Paper Money:
"16. Savings Banks:
"17. Weights and Measures:

[1] For the various legal interpretations of this article, see Lefroy, pp. 70-79; Scott, Chap. V., and also Sir John Thompson's memorandum of Aug. 3, 1889, in which he argues that the word "exclusive" excludes the Imperial Parliament.

"18. Bills of Exchange and Promissory Notes:
"19. Interest:
"20. Legal Tender:
"21. Bankruptcy and Insolvency:
"22. Patents of Invention and Discovery:
"23. Copyrights:
"24. Indians and Lands reserved for the Indians:
"25. Naturalization and Aliens:
"26. Marriage and Divorce:
"27. The Criminal Law, except the Constitution of the Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters:
"28. The establishment, maintenance and management of Penitentiaries:
"29. Such Classes of Subjects as are expressly excepted in the enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces:

"And any matter coming within any of the Classes of Subjects enumerated in this section shall not be deemed to come within the Class of matters of a local or private nature comprised in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces."

But Canada was not to be permitted to legislate at will on these matters. Through the provisions of Articles 55, 56, and 57, the Government of Great Britain retained a check on Canadian legislation.[1] These articles placed three checks

[1] Article 55, "Where a Bill passed by the Houses of Parliament is presented to the Governor-General for the Queen's assent, he shall declare, according to his discretion, but subject to the provisions of this Act and to Her Majesty's instructions, either that he assents thereto in the Queen's name, or that he reserves the Bill for the signification of the Queen's pleasure.

Article 56, "Where the Governor-General assents to a Bill in the Queen's name, he shall by the first convenient opportunity send an authentic copy of the Act to one of Her Majesty's Principal Secretaries of State, and if the Queen in Council within two years after receipt thereof by the Secretary thinks fit to disallow the Act, such

upon the exclusive legislative powers of Canada, 1, Veto; the Governor-General could veto a measure by withholding the King's assent: 2, Reservation; the Governor-General could reserve a bill for final approval by the Government of the United Kingdom: 3, Disallowance; within a period of two years the Imperial Government had the privilege of disallowing any Act of the Canadian Parliament.

13. Veto

The power to veto Dominion legislation has long since been obsolete.[1] The right of a Governor to exercise a discretionary veto disappeared in Canada with the advent of responsible government. In 1849 Lord Elgin, acting upon the advice of his ministry, assented to a "Rebellion Losses Bill" in spite of the protests of "loyal" sections of the populace, who urged him to use the veto power in order to prevent the "indemnification of rebels."[2] Of the Governor-General's veto Keith writes: "There is no recorded case of its use in recent years, and the high respect due to the elected Parliament of a Dominion or State makes it clear that it would be improper for a Governor, even on instruc-

Disallowance (with a certificate of the Secretary of State of the day on which the Act was received by him) being signified by the Governor-General, by Speech or Message to each of the Houses of the Parliament or by Proclamation, shall annul the Act from and after the day of such signification.

Article 57, "A Bill reserved for the signification of the Queen's pleasure shall not have any force unless and until within two years from the day on which it was presented to the Governor-General for the Queen's Assent, the Governor-General signifies, by Speech or Message to each of the Houses of Parliament or by Proclamation, that it has received the Assent of the Queen in Council."

[1] Riddell, "Constitution of Canada," p. 97; Porritt, p. 414; Keith, "Imperial Unity," p. 143.

[2] For a detailed account, see Lord Elgin's letter of April 30, 1849, to Earl Grey, Kennedy, "Documents," p. 579.

tions from the Imperial Government, to withhold assent to a Bill. It is conceivable that a Governor might be advised by his ministers to withhold assent from a Bill which the two Houses had passed, purely as a technical means of reversing an error in legislation, which had gone too far to be corrected in any other way, and it has been suggested that when a Bill had been passed in defective form through the two Houses, and it was desired to alter it, it would be better to let it thus fall to the ground, and to bring forward a new measure, but the possibility of such action remains hypothetical.''[1]

14. Reservation[2]

The power of reservation proved more of a check than the veto power. In the first eleven years after the formation of the Dominion the Governor-General reserved twenty-one bills for final approval by the Government of the United Kingdom. The Dominion statesmen, firmly believing in the principles of responsible government, found such a condition intolerable. They insisted on the abolition of this right of the Governor-General to reserve bills. Mr. Edward Blake visited England and made a strenuous protest. Concerning reservation he wrote, in 1876, ''it would be better and more conformable to the spirit of the constitution of Canada, as actually framed, that the legislation should be completed on the advice of Her Majesty's Privy Council for Canada; and that, as a protection to Imperial interests, the reserved power of disallowance of such completed legislation is sufficient for all possible purposes.[3] He requested that the

[1] Keith, ''Imperial Unity,'' p. 143.

[2] Borden, pp. 64-66.

[3] Sessional Paper No. 13, of 1877.

clauses relating to reservation be omitted from the instructions to the Governor-General. The Dominion Government was not successful in obtaining from the Government of the United Kingdom a complete abandonment of the power of reservation, but it did obtain the abandonment of the right to reserve certain classes of bills. This concession was secured through the issuance of Permanent Instructions to the Governor-General of the Dominion of Canada, in 1878. These instructions, unlike the previous ones, no longer direct the Governor-General to reserve certain kinds of bills. However, Section IV of the Instructions clearly shows that the right of reservation on the part of the Governor-General was not being surrendered. The significance of these instructions was that the Government of the United Kingdom abandoned reservation as a fixed rule. That they had not relinquished it entirely was shown by the fact that an act was reserved in 1886.

The Canadian Government continued to adhere to Blake's opinion that the Governor-General as head of a country with responsible government should assent to all measures presented to him by his ministers. As a result of consistent action on the part of the Dominion Government an apparently satisfactory practice has arisen whereby the Government of the United Kingdom tacitly recognizes the Canadian contention and hence no longer uses the power of reservation. This development is illustrative of the arrangements and understandngs which, in spite of legal form and apparently irreconcilable differences, have enabled the various Governments within the British Empire to

work together harmoniously, thus preserving the unity of the Empire. According to this practice measures of a nature which in early times would have called for their reservation, are now passed with a suspensory clause. That is, such an Act will contain a provision stipulating that the whole Act, or certain parts of it, shall not become operative until the Governor-General issues a proclamation to that effect. This proclamation, in turn, is issued upon the advice of the Dominion Government.[1] The procedure may at first appear strange, and one naturally wonders why the suspensory feature is introduced, when the proclamation ultimately putting the law into force is issued on the advice of the Dominion Government. Closer study reveals the reasons. In the first place the practice establishes the principle enunciated by the Dominion Government that the Governor-General should be a constitutional monarch acting upon the advice of his ministers and it satisfies the Canadian contention that the right of reservation should be abandoned. Secondly, the interim between the completion of the legislation and the issuance of the proclamation affords the Imperial Government an opportunity to point out the objectionable features of the measure to the Dominion Government, and to urge their reasons why such provisions ought not to be contained in the Act. Should the Imperial Government be able to demonstrate the reasonableness of their objections to the Canadian Government, then all that is necessary to prevent the legislation from coming into effect is for the Dominion Government to advise the Gov-

[1] cf. Borden, p. 66.

ernor-General not to issue a proclamation. On the other hand, it might be possible for the Dominion Government to explain away the objections of the Imperial Government. In such a case, the issuance of the proclamation would bring the act into effect. Should the Governments fail to agree it is problematical what the result would be. They have always managed to agree; the fact that there is a desire on the part of both the United Kingdom and the Dominion statesmen to preserve the unity of the Empire and as far as possible to do nothing that would disrupt it, is naturally conducive to an agreement being reached. Thus through this practice the demands of Canada are met, but still the Imperial Government has the assurance that contentious legislation will not be put into effect until they have had a fair chance to present their views. The right of reservation is dead. In its place has arisen a custom whereby the Government of the United Kingdom is allowed the right to attempt to persuade the Canadian Government that certain legislation is inimical to the interests of the Empire; but the final decision remains with the Canadian Government.

15. Disallowance

The third check placed upon Canadian legislation by the British North America Act was that of disallowance.[1] The Government of the United Kingdom had the right to disallow, by Order-in-Council, any act of the Dominion Government within a period of two years. Since 1867 only

[1] cf. Borden, pp. 64-66.

one Act—the Oaths Bill—has been disallowed. The history of this Act is interesting. Section 18 of the British North America Act provided that the privileges, immunities, and powers to be held, enjoyed, and exercised by the Senate and by the House of Commons and by the members thereof respectively, should be such as were from time to time defined by Act of the Parliament of Canada, but so that the same should never exceed those at the passing of the British North America Act held, enjoyed, and exercised by the House of Commons of the United Kingdom. During the Pacific Railway scandal it was considered desirable to have a Canadian Parliamentary Committee which could take evidence on oath. Accordingly an Act, commonly known as the Oaths Bill, empowering a Parliamentary Committee to take evidence on oath, was passed by the Canadian Parliament. The Dominion Government had some doubt as to their power to pass such an Act because in 1867 when the British North America Act was enacted the privilege of examining witnesses on oath was not enjoyed by the House of Commons of the United Kingdom, and hence according to Sec. 18 of the British North America Act such a privilege was forbidden the Canadian Parliament. The legislation, however, was completed in Canada and was then sent to the Government of the United Kingdom with a memorandum expressing doubt as to whether such legislation could be passed by the Canadian Parliament. In that way the Canadian Government practically invited disallowance of the Act. In 1873 the Government of the United Kingdom disallowed the bill as being *ultra vires*—outside the power—of the Parliament of Canada. Then in 1875 the Imperial

Parliament passed a "Parliament of Canada Act" which repealed Sec. 18 of the British North America Act and substituted therefore the provision that the privileges, immunities, and powers to be held, enjoyed and exercised by the Senate and by the House of Commons of Canada should be such as are from time to time defined by Act of the Parliament of Canada, but any Act of the Parliament of Canada defining such privileges, immunities and powers should not confer any privileges, immunities, or powers exceeding those at the passing of such Act held, enjoyed, and exercised by the House of Commons of the United Kingdom. The Act further provided that the Act of the Parliament of Canada passed in the thirty-first year of the reign of her Majesty, chapter twenty-four, intituled *An act to provide for oaths to witnesses being administered in certain cases for the purposes of either House of Parliament,* should be deemed to be valid, and to have been valid as from the date at which the royal assent was given thereto by the Governor-General of the Dominion of Canada. Thus not only was the disability placed on the Canadian Parliament removed, but the previous Act was validated. This is the only case where legislation completed in Canada has been disallowed by the Government of the United Kingdom; and in this case the disallowance, which proved only temporary, was practically invited by the Canadian Government.

This power of disallowance is very inexpedient. As Keith writes: "This form of disapproval is the worst possible: the Act having taken effect there is no possible justification for upsetting it except in the grave case of necessity, and if that

neeessity arises it should be possible to secure the alteration whieh may be required by the sending of a proper representation to the Dominion Government, and not by the use of disallowanee.'' The Government of the United Kingdom, reeognizing this, allowed the power to fall into disuse. For some time the eontention of the Canadian Government has been that the United Kingdom no longer has the power of disallowanee. Sir Robert Borden writes that ''the power of disallowance has not been exereised by the British Government for more than fifty years, and while it still has a legal existenee, it may be regarded as eonstitutionally dead.''[1] Finally the Premier of the United Kingdom asserted that the power of disallowanee was praetieally obsolete. This stand was taeitly assented to by the Seeretary of State.[2] Thus, as with the right of reservation, so also with the power of disallowanee, the form and legal power have been restrieted by substanee and eonstitutional right, and no longer has the Government of the United Kingdom the eonstitutional right to disallow Aets of the Parliament of Canada.

16. Non-Repugnaney

These three eheeks imposed by the British North Amerieа Aet were not the only ones with whieh the Parliament of Canada had to eontend. There were others arising from the faet that the Canadian Parliament was legally a non-sovereign body. Of these the first was known as non-repugnaney. That is, the Canadian Government, deriving its

[1] Borden, p. 66.

[2] Keith, ''War Government,'' pp. 258-261.

powers from the Parliament of the United Kingdom, did not possess the right to pass any Act repugnant to an Act of the United Kingdom. Should such an Act be passed it would be invalid.[1] This principle was clearly established by the Colonial Laws Validity Act of 1865,[2] which among other things declared that: "Any colonial law, which is or shall be repugnant to the provisions of any Act of Parliament extending to the colony to which such law may relate, or repugnant to any order or regulation made under authority of such Act of Parliament, or having in the colony the force or effect of such Act, shall be read subject to such Act, order, or regulation, and shall, to the extent of such repugnancy, but not otherwise, be and remain absolutely void and inoperative.

"No colonial law shall be or be deemed to have been, void or inoperative on the ground of repugnancy to the law of *England,* unless the same shall be repugnant to the provisions of some such Act of Parliament, order, or regulation, as aforesaid."

After the passage of the British North America Act the Imperial Government for a long time insisted that this principle was still effective. The Canadian Government just as strenuously disputed that claim. Three subjects of legislation — Naturalization, Copyright, and Merchant Shipping — permitted the two Governments to air their differences. The settlements arrived at definitely upheld Canada's contention. These subjects will be discussed in

[1] For a detailed discussion of the early history of "Repugnancy of Colonial laws" see Keith "R. G. in D." Part III, Chap III, and Keith, "Imperial Unity," pp. 139-142.

[2] For the Act, see Kennedy "Documents," p. 595.

detail further on.[1] At this point it is sufficient to note that the principle of non-repugnancy has gone into discard. Prof. Keith in his "Responsible Government in the Dominions," 1912, saw in this principle a real check on the legislative power of Canada; conditions had not changed to such an extent, when he wrote his "Imperial Unity," 1915, as to cause him to alter his views. But in 1921 he wrote as follows: "By 1914 the rule had been effectively established that in all matters of internal government the Dominions must be allowed the decision of the action to be taken, however much their policy might diverge from that which was adopted by the Imperial Government for the United Kingdom, whether as regards fiscal matters, social legislation, or family relations."[2] Professor Keith has correctly interpreted the position of the Imperial Government at the time he wrote. In 1912, and at the beginning of the war, the Government of the United Kingdom undoubtedly still held strongly to the position that an Act of the Parliament of Canada repugnant to an Act of the United Kingdom was invalid. Due to the rapid strides made by Canada during the war, and due to the satisfactory understandings arrived at between the Government of the United Kingdom and the Government of Canada the principle of non-repugnancy has been abandoned.

The practice[3] now followed, for legislation wholly a matter of internal concern, is that each Government is at liberty

[1] See infra Sections 22, 23 and 24.

[2] "War Government in the Dominions," p. 8.

[3] This practice is illustrative of the extra-legal understandings that enable the Empire to hold together.

to do so as it sees fit. On such matters, e. g., Copyright and Naturalization, where it is deemed expedient to have uniform legislation, each Government will legislate along certain lines previously agreed upon. Neither Government dictates to the other; neither one determines the course of the legislation, the other following; but together they arrive at the course to be pursued.[2] Thus through co-operation the desired ends are obtained in a manner satisfactory to the Governments, and once more an example is presented where a power possessed by the Mother Country, but obnoxious to the Dominion Government, has been restricted by constitutional practice.

17. Extra-territorial Legislation

The other limitation supposedly imposed by the non-sovereign nature of the Canadian Parliament was that it could not legislate with extra-territorial effect; Canadian laws were limited by the boundaries of the country.[3] Professor Keith upheld this contention; he asserted that it was obvious that nothing but chaos would result if each colony were allowed to legislate without regard to the limits of the colony.[3] High Canadian authorities, however, claimed that the Canadian Government had the same power to bind its subjects everywhere as the Imperial Parliament had to bind British subjects everywhere.[4] In the King vs.

[1] Hansard, 1921, LVI. No. 19, p. 821.

[2] Borden, pp. 128-129; Keith, "R. G. in D." Part III, Chap. II

[3] Keith, "R. G. in D.," p. 372.

[4] Lefroy, p. 80. See also Clement, "Law of the Canadian Constitution," 3rd edition, pp. 65-115.

Brinkley,[1] Meredith, J. A., pointed out that it was altogether too narrow a proposition to say the legislative power of a Canadian legislature is strictly limited to matters wholly within the territorial limits. He cited the Deportation Act, the Extradition Act, the enactment against bringing stolen property into Canada, and the legislation respecting officers in England and other countries, maintained by Canada for political and commercial purposes as examples to show the error of that proposition. To settle this matter the Canadian Parliament, in June 1920, passed a resolution asking that section 91 of the British North American Act, 1867, be amended by adding thereto the following subsection: "Any enactment of the Parliament of Canada otherwise within the legislative authority of the Parliament shall operate and be deemed to have operated extra-territorially according to its intention in the like manner and to the same extent as if enacted by the Parliament of the United Kingdom."[2]

18. Fiscal and Trade Policy

Specific and general limitations, which at one time were placed upon the legislative power of the Canadian Parliament, have all disappeared, leaving Canada with complete legislative power. The full measure of this power can best be ascertained by a consideration of the Canadian Parliament's action on various matters such as fiscal policy, immigration, etc.

Canada's complete independence of Great Britain, as far

[1] Ontario Law Report 1907, Vol. XIV, pp. 434-456.

[2] Hansard, 1920, No. 80, p. 4284. The Amendment has not yet been passed.

as fiscal and trade policy is concerned, was declared in no uncertain terms in 1859. The occasion was the passage of the Canadian Customs Act, which purposed levying high tariff duties for revenue and protection. The Chamber of Commerce of Sheffield, England, immediately protested to the Secretary of State for the Colonies, the Duke of Newcastle. The Colonial Secretary forwarded this protest to the Governor of Canada with the statement that he could not but feel that there was much force in the argument of the Sheffield manufacturers. Further, he regarded the measure as operating differentially in favor of the United States, as impolitic and as injurious, and he intimated that disallowance of the Act was under consideration. The Duke's memorandum, accompanied by the protest, was sent to Canada on August 13, 1859. On October 25th the Minister of Finance, Mr. (afterwards Sir) Alexander Galt, submitted a report commenting on the Sheffield protest. His report was approved by the Cabinet, and on November 11th it was sent to the Colonial Secretary. In no ambiguous terms the minister of Finance declared:[1] "From expressions used by his Grace in reference to the sanction of the Provincial Customs Act, it would appear that he had even entertained the suggestion of its disallowance; and though happily her Majesty has not been so advised, yet the question having been thus raised, and the consequences of such a step, if ever adopted, being of the most serious character, it becomes the duty of the Provincial Government distinctly to state what they consider to be the position and rights of the Canadian Legislature.

"Respect to the Imperial Government must always dictate

[1] The whole report is well worth reading. It can be found in Keith's "Selected Documents," Vol. II, pp. 51-83.

the desire to satisfy them that the policy of this country is neither hastily nor unwisely formed; and that due regard is had to the interests of the Mother Country as well as of the Province. But the Government of Canada acting for its Legislature and people cannot, through those feelings of deference which they owe to the Imperial authorities, in any manner waive or diminish the right of the people of Canada to decide for themselves both as to the mode and extent to which taxation shall be imposed. The Provincial Ministry are at all times ready to afford explanations in regard to the acts of the Legislature to which they are party; but, subject to their duty and allegiance to her Majesty, their responsibility in all general questions of policy must be to the Provincial Parliament, by whose confidence they administer the affairs of the country; and in the imposition of taxation it is so plainly necessary that the Administration and the people should be in accord, that the former cannot admit responsibility or require approval beyond that of the local Legislature. Self-government would be utterly annihilated if the views of the Imperial Government were to be preferred to those of the people of Canada. It is, therefore, the duty of the present Government distinctly to affirm the right of the Canadian Legislature to adjust the taxation of the people in the way they deem best, even if it should unfortunately happen to meet the disapproval of the Imperial Ministry. Her Majesty cannot be advised to disallow such acts, unless her advisers are prepared to assume the administration of the affairs of the Colony irrespective of the views of its inhabitants.

"The Imperial Government are not responsible for the debts and agreements of Canada. They do not maintain its judicial, educational, or civil service; they contribute nothing to the internal government of the country, and the Provincial Legislature acting through a ministry directly responsible to it, has to make provision for all these wants; they must necessarily claim and exercise the widest latitude as to the nature and extent of the burthens to be

placed upon the industry of the people. The Provincial Government believes that his Grace must share their own convictions on this important subject; but, as serious evil would have resulted had his Grace taken a different course, it is wiser to prevent future complication by distinctly stating the position that must be maintained by every Canadian Administration.''

That was the end of interference on the part of the Government of Great Britain in the fiscal and trade policies of Canada. The Government of Canada continues to maintain this independent attitude, and it determines the fiscal and trade policies of Canada in accordance with the wishes of the Canadian electorate.

19. Defence[1]

Canada also enjoys complete control over her defences, her army and navy. In 1902 the Canadian Government offered to assume the defence of Halifax and Esquimault. This offer was accepted by the Imperial Government, and as a result the last of the Imperial troops were withdrawn from Canada in 1905. The small permanent Canadian Army is controlled by Dominion Statute. At one time the Militia Act required that the Commander-in-Chief be a British general officer, but this system proved unsatisfactory. It was found necessary to dismiss that officer in 1904. The plan of a Militia Council, with an Inspector-General was then adopted; it has been in vogue ever since. As a result of the Conference of 1907, and of the subsidiary Naval and Military Conference of 1909, an Imperial General Staff was created. The object in view was the co-ordination of the defence forces of the Empire—not through compulsion, but

[1] Borden, pp. 97-103.

through suggestion and co-operation. The plan was to continue the General Staffs in each Dominion; they were to remain under the complete control of the Dominion Government. Then there was to be an Imperial General Staff, containing a Dominions' Section, which was to consist of Dominion Officers who were to act as liaison officers between the Imperial General Staff and the Dominion General Staff. Thus through co-operation the forces could be co-ordinated. Canada did not enter into the plan as heartily as other of the Dominions, and as a result, when war broke out, little had been done to plan concerted action.[1]

During the war the Canadian Expeditionary Forces, while in Canada, were completely under the control of the Dominion. It necessitated an Imperial Army Act in order to extend that control overseas. As a result of this Act Canadian troops in England were also completely under Canadian control. At General Headquarters in France a Canadian section was established, to which all matters concerning the Canadian Corps, except those having for their end military operations, were referred.[2] Section 177 of the Army Act clearly gave Canada absolute control of her troops except as to military directions in the field.[3] There, for the purposes of co-operation, they were subject to the Commander-in-Chief of the British Army. In 1916 a Canadian Overseas Ministry of Militia was established. It administered the overseas forces of Canada as forces of an autonomous government.[4] During the first

[1] Keith, "War Government," p. 12.
[2] Revised, Hansard, 1919. Vol. 136, p. 2858.
[3] Revised, Hansard, 1918. Vol. 132, p. 600.
[4] Borden, p. 99.

few years of the war the Canadian Army Corps had been under the command of an English Army Officer, but in July 1917, a Canadian Officer, Lieut. General Sir Arthur Currie, was placed in command. Before the close of the war the Canadian forces were under the direct control of the Canadian Government, except for the Supreme Allied Command;[1] this control, however, was one to which the armies of all the Allied countries were subjected. After the cessation of hostilities and the return of the Canadian Forces, Canada re-established her Army, over which she continues to exercise complete control, on a peace basis.

Canada's action with regard to a navy has been mostly of a negative character. Down to 1909 the Dominion declined to consider naval defence as incumbent on her resources.[2] As a result of the Conferences of 1909 and 1911 the Dominion agreed to embark upon a policy of naval construction, but the change of Government in the autumn of 1911 caused an alteration in Canada's naval policy. In December 1912 the Prime Minister, Sir Robert Borden, asserting that an emergency existed, asked Parliament to vote the sum of thirty-five million dollars, to be given to Great Britain for the construction of battleships. These ships were to revert to Canada should the Canadian Parliament at any subsequent time decide to establish a navy.[3] The measure was defeated, and when war broke out Canada neither had a navy, nor had she contributed to the Imperial Navy.[4]

[1] Borden, pp. 99, 100, and Lecture.

[2] Keith, "Imperial Unity," pp. 310-339.

[3] The debates on this subject are very interesting. See Revised Hansard, 1912-1913.

[4] Canada did possess two obsolete battleships at the outbreak of the war, but soon thereafter they were taken out of active service.

During the Imperial War Conference of 1918 the British Admiralty circulated a memorandum on Naval Defence of the Empire. On August 15, 1918, the Overseas Prime Ministers held a meeting in the Savoy Hotel. There they drew up and passed upon a memorandum which they sent to the Admiralty. This memorandum stated:

"1. The proposals set forth in the Admiralty Memorandum for a single navy at all times under a central naval authority are not considered practicable.

"2. Purely from the standpoint of naval strategy the reasons thus put forward for the establishment of a single navy for the Empire under a central naval authority, are strong but not unanswerable. The experience gained in this war has shown that in time of war a Dominion Navy (e. g. that of Australia), can operate with the highest efficiency as a part of a united navy under one direction and command established after the outbreak of war.

"3. It is thoroughly recognized that the character of construction, armament and equipment, and the methods and principles of training, administration and organization, should proceed upon the same lines in all the navies of the Empire. This policy has already been followed in those Dominions which have established naval forces.

"4. For this purpose the Dominions would welcome visits from a highly qualified representative of the Admiralty who, by reason of his ability and experience, would be thoroughly competent to advise the naval authorities of the Dominions in such matters.

"5. As naval forces come to be developed upon a considerable scale by the Dominions it may be necessary hereafter to consider the establishment for war purposes of some supreme naval authority upon which each of the Dominions would be adequately represented."[1]

As a result of this memorandum Admiral Jellicoe visited

[1] Hansard Vol. LV, No. 71, p. 3605.

Canada in November-December, 1919, and after an inspection of some weeks he reported to the Canadian Government. This report was tabled in the Canadian House of Commons on March 10, 1920. The report suggested four alternative naval units, ranging in annual cost for construction and maintenance from $25,000,000 to $5,000.000. The first fleet, to cost $25,000,000 annually, would contain 2 battle cruisers, 7 light cruisers, 1 flotilla leader, 1 destroyer parent ship, 16 submarines, 1 submarine parent ship, 2 aircraft carriers, 4 fleet mine-sweepers, 4 local defence destroyers, 8 "P" boats, and 4 trawler mine-sweepers. The second, to cost $17,500,000 annually, would embrace 1 battle cruiser, 5 light destroyers, 1 flotilla leader, 6 destroyers, 1 destroyer parent ship, 2 fleet mine-sweepers, 4 local defence destroyers, 8 "P" boats, and 4 trawler mine-sweepers. In the third fleet to cost $10,000,000 annually, there would be 3 light cruisers, 1 flotilla leader, 8 submarines, 1 submarine parent ship, 4 local defence destroyers, 8 "P" boats, and 4 trawler mine-sweepers. In the fourth unit, to cost $5,000,000 annually, there would be 8 submarines, 4 local defence destroyers, 8 "P" boats, and 4 trawler mine-sweepers. The report suggested that Canada should consider naval defence, firstly, from the standpoint of her own safety, and secondly, from the broader standpoint of the safety and security of the Empire. For the protection of the ports and commerce of the Dominion it was considered that 3 light cruisers, 1 flotilla leader, 12 torpedo ships, 8 submarines with 1 parent ship, and certain auxiliary small craft for training purposes would be required. In other words, considering only her own protection Canada should adopt plan three—at an annual cost of $10,000,000 and inferentially, if she cared to take into consideration the broader standpoint of the safety and security

of the Empire she should adopt plans two or one at an annual cost of $17,500,000 or $25,000,000.

The report was tabled and a memorandum was issued by the Minister of Naval Affairs in which he stated:[1]

"The Government has had under consideration for some time the question of the naval defence of Canada and the suggestion of Admiral Viscount Jellicoe in reference thereto.

"In view of Canada's heavy financial commitments and of the facts that Great Britain has not as yet decided on her permanent naval policy, and of the approaching Imperial Conference at which the question of naval defence of the Empire will come up for discussion between the Home Government and the Overseas Dominions, it has been decided to defer in the meantime action in regard to the adoption of a permanent naval policy for Canada.

"The Government has decided to carry on the Canadian Naval Service along pre-war lines and has accepted the offer of Great Britain of one light cruiser and two torpedo boat destroyers to take the place of the present obsolete and useless training ships, the Niobe and Rainbow."

In preparing the budget for the following year the original estimate for the maintenance of the Royal Canadian Navy was $300,000 as contrasted with the $10,000,000 which Lord Jellicoe's report advised as necessary for the protection of Canada. Subsequent to the acceptance of the British Government's gift to Canada of 1 cruiser of 4,800 tons, 2 destroyers of 1004 tons each, and 2 submarines of 364 and 434 tons, it became necessary to vote an additional $2,200,000 in the Supplementary Estimates. Thus the total amount of money which the Canadian Government contemplated spending on naval service during the ensuing year was $2,500,000. In May, 1921, when the estimates for the

[1] Hansard, Vol. LV, No. 71, p. 3605.

fiscal year ending March 1922, were being passed, the Government again asked for $2,500,000 for the naval service, to be expended for the operation and maintenance of the cruiser, the two destroyers, the two submarines, the Naval College, and the dockyards at Esquimalt and Halifax.[2] The report of March 10, 1920, remains tabled. The independence of the Dominions in the matter of naval defense was declared at the Imperial Conference of 1921.[1] The conference resolved, "That, while recognizing the necessity of co-operation among the various portions of the Empire to provide such Naval Defence as may prove to be essential for security, and while holding that equality with the naval strength of any other Power is a minimum standard for that purpose, this Conference is of opinion that the method and expense of such co-operation are matters for the final determination of the several Parliaments concerned, and that any recommendations thereon should be deferred until after the coming Conference on Disarmament."

20. Immigration

As far as immigration[3] is concerned, Canada's trials and troubles have been increased by the heterogeneous nature of the British Empire. Canada has always asserted her right to control her immigration. She was successful in consummating satisfactory arrangements for the admission of Chinese. In 1908 Mr. Lemieux visited Japan and arranged a Gentlemen's Agreement with the Japanese gov-

[1] Report of the Imperial Conference, 1921.
[2] The amount expended was $1,793,655.37.
[3] Borden, 103-107; Keith, "R. G. in D." Part V, Chap. IV. Keith, "Imperial Unity," Chap. IX.

ernment, whereby Japanese emigration to Canada was limited. But the immigration of British Indians has caused great difficulties. As members of the same Empire the Indians felt that they should be accorded the right of unrestricted admission to all parts of the Empire. They made strenuous efforts to obtain this right; Canada just as vigorously opposed the movement. The Government of the United Kingdom endeavored to bring the contending factions to a satisfactory settlement. In 1917 the matter was brought up before the Imperial War Conference, and the principle of reciprocity was agreed to.

At the Imperial War Conference of 1918 the matter was again discussed. The principle of the reciprocity was reaffirmed and "the inherent right of each part of the Empire to exercise complete control of the composition of its population by restricting immigration from other parts" was declared. At the Imperial Conference of 1921 the following resolution was adopted:

"The Conference, while reaffirming the Resolution of the Imperial War Conference of 1918, that each community of the British Commonwealth should enjoy complete control of the composition of its own population by means of restriction on immigration from any of the other communities, recognizes that there is incongruity between the position of India as an equal member of the British Empire and the existence of disabilities upon British Indians lawfully domiciled in some other parts of the Empire. The Conference accordingly is of the opinion that in the interests of the solidarity of the British Commonwealth, it is desirable that the rights of such Indians to citizenship should be recognized.

"The representatives of South Africa regret their inability to accept this resolution in view of the exceptional circumstances of the greater part of the Union.

"The representatives of India, while expressing their appreciation of the acceptance of the resolution recorded above, feel bound to place on record their profound concern at the position of Indians in South Africa, and their hope that by negotiation between the Governments of India and of South Africa, some way can be found, as soon as may be, to reach a more satisfactory position."

This resolution, however, does not curtail Canada's power of complete control over immigration.

21. Merchant Shipping

The control of merchant shipping was the cause of a long controversy between the Mother Country and Canada.[1] This controversy centered on Canada's power or lack of power to enact extra-territorial legislation. It was argued that inasmuch as Canadian legislation could not extend beyond the three mile limit the provisions of the Imperial Merchant Shipping Act became applicable to Canadian ships as soon as they went beyond that limit. The power of the Canadian Parliament to legislate with extra-territorial effect will definitely settle this phase of the question. At present, Canadian ships are regulated by the Canada Shiping Act. Uniformity of Canadian and British Shipping legislation is secured through co-operation, and the practice has been followed in Canada of consulting the Board of Trade established under the Imperial Merchant Shipping Act before any changes are made in the Canada Shipping Act.

During the war the Government of the United Kindom

[1] Keith, "Imperial Unity," Chapter X; also see Keith, "R. G. in D.", Part VI, Chapter II, and p. 1322; Borden, pp. 69-70, 121-122.

sought to requisition ships registered in Canada. The Canadian Government opposed the attempt and asserted that they alone had the constitutional power to requisition Canadian ships. Their views were set forth in a Minute of Council, January 30, 1917. The Minute stated:

"The question to be determined is not one of legal power but of constitutional right. This distinction is well recognized in the Conventions which control the exercise of legislative power. For example, the Parliament of the United Kingdom has the legal power but not the constitutional right to legislate directly in respect of Canadian affairs and in doing so to repeal *pro tanto* the British North America Acts. It is submitted that the exercise of His Majesty's prerogative with respect to Canada must be governed by the like considerations. It is the Parliament of Canada alone which constitutionally can determine and prescribe the burdens to be borne by this Dominion or by any of its citizens for the purposes of this or any other war. Similarly when the prerogative of the Crown is to be exercised, the minister has no doubt that in respect of all matters which involve a contribution by citizens domiciled in this country, this prerogative must be exercised upon the advice of Your Excellency's Ministers and not upon the advice of the Government of the United Kingdom.... If a ship be registered and the owners be domiciled and reside within Canada, the compulsory displacing of the ownership or control of the ship in favour of the Crown for any public purpose should, independently of the actual location at the time of the ship itself, be likewise a matter for the consideration and sanction of the Government of Canada through the means with which the Government is constitutionally endowed."

The Canadian contention was accepted by the Government of Great Britain, and Canadian ships were requisitioned only upon the authority of the Government of Canada.

On April 4, 1918, the Dominion Government announced an ambitious ship-building programme. By March 29, 1921, the

Canadian Government Merchant Marine consisted of 47 vessels with a total tonnage of 259,783 tons. Sixteen more are to be completed.[1] The total net earnings for the year 1920 were $781,460.09.[2] These ships fly the distinctive Canadian flag,[3] they ply to the four corners of the globe, and they are completely under the control of the Canadian Government.

Canada's determination to control her own shipping was further illustrated at the Imperial Conference of 1921. The Conference approved the recommendations made in the Report of the Imperial Shipping Committee on the Limitation of Shipowners' Liability by Clauses in Bills of Lading, and recommended the various Governments represented at the Conference to introduce uniform legislation on the lines laid down by the Committee. The Governments of the United Kingdom, of New Zealand and of India were willing to agree to a resolution recommending the constitution under Royal Charter of a permanent Committee with wide powers.[4] The Governments of Australia and South

[1] For an account of the operations of the Canadian Government Merchant Marine, see Hansard LVI, No. 29 of 1921.

[2] "Information now available shows that there is an actual operating loss of $1,761,344 for the calendar year ended December, 1921,—Toronto "Globe," Feb. 21, 1922.

[3] Hansard, LVI, No. 19, p. 824.

[4] The powers of this Permanent Committee were to be:

"To perform such duty as may be entrusted to them under laws in regard to Inter-Imperial Shippiug, applicable to the whole or to important parts of the Empire;

"To inquire into complaints in regard to ocean freights and conditions in Inter-Imperial trade or questions of a similar nature referred to them by any of the Governments of the Empire;

"To exercise conciliation between the interests concerned in Inter-Imperial Shipping;

"To promote co-ordination in regard to harbors and other facilities necessary for Inter-Imperial Shipping."

Africa reserved the suggestion for further consideration. The Canadian Government, however, did not agree to the proposal. As a result the matter was not pressed, and a resolution was passed to the effect that the existing Imperial Shipping Committee should continue its inquiries.

22. Copyright

"Copyright affords a case in which even the demands of Canada for freedom of action were refused for many years."[1] In 1842 the Imperial Parliament passed a Copyright Act to be applicable throughout the Empire. The Canadian colonies immediately protested and the Legislature of Canada, in 1843, passed a resolution declaring that the law neither could nor would be enforced. In 1847 satisfactory arrangements were completed whereby the provisions of the Imperial Act would be suspended in any colony possessing a Copyright Act approved by the Imperial Government. This enabled the various Canadian Provinces to have their own Copyright legislation. This Provincial legislation was replaced by a Canadian Act immediately after Federation. The new Act was confirmed by Order-in-Council in 1868. In 1875 the Canadian Government legislated again on Copyright. There was some doubt as to the validity of the Act, hence it was ratified by an Imperial Act of the same year. Then in 1886 the Imperial Parliament passed an International Copyright Act which was to be

[1] Keith "Dominion Home Rule in Practice," p. 28. See also, Hansard, Vol. LVI No. 70; Keith, "Responsible Government in the Dominions," pp. 1216-1237; Keith, "Imperial Unity," Chap. XI; Borden, pp. 66-68.

applicable to the whole Empire. The Canadian Government, however, dissatisfied with the legislation and with the results of the Berne Convention, passed a Canadian Copyright Act in 1889. The controversy as to which Act was applicable in Canada raged back and forth until in 1911 the Imperial Parliament passed a new Copyright Act in which it was provided that the Act was not to be applicable to the Dominions unless their Parliaments so legislated. The Dominions also were given power to repeal British Copyright legislation so far as it was in operation in the Dominions.

In 1911 a measure, following the British legislation very closely, was introduced in the Canadian House of Commons; but no action was taken. In 1919 a bill was passed through the Senate—but it did not succeed in passing the House of Commons. In 1920 the question of Copyright legislation came before the House of Commons again, but owing to a conflict of interests between publishers and authors the matter was dropped. Thus the unsatisfactory condition existed in Canada that Copyright was governed partly by Imperial Statutes of 1842 and 1886, and by a Canadian Act of 1889. To end this chaotic condition the Canadian Parliament in 1921 enacted copyright legislation. A large part of this legislation followed the Imperial Act of 1911 very closely. But the Canadian Parliament did not hesitate to act as it saw fit irrespective of the provisions of the Imperial Act. Copyright in Canada is controlled by Canadian legislation. Thus another controversy terminated in favor of Canada.

23. Naturalization.[1]

By the Imperial Naturalization Acts of 1847 and 1870 Colonial legislatures were empowered to confer the status of a British subject upon aliens, but only within the limits of the Colony. That is, a citizen of the United States naturalized in Canada became a British subject in Canada, but he did not enjoy that status in the United Kingdom. Such a system proved highly inconvenient. As a result, at the Imperial Conference of 1911 an agreement for common naturalization was reached by the United Kingdom and the Dominions.[2]

Consequently in 1914 the United Kingdom and the Dominion of Canada enacted concurrent naturalization

[1] Borden, pp. 68-69.

[2] Hansard, Vol. LVI No. 19, p. 821. Mr. Doherty.

"Everybody came to an agreement that if it was a desirable thing to have a naturalization that would go all over the Empire the best way to do it was by legislation. I do not say that anyone sat down and said "I will do it," but that was what was agreed to be the best thing to do. Carrying that out the British authorities drafted an Act which they claimed carried out the understanding, or which purported to do so. That Act was circulated throughout the Dominions and they were all asked if it was acceptable to them. All of them except Canada said that it was acceptable. Now I do not want to indulge in anything in the nature of criticism at all, but the draft had come to this country shortly before the change of Government. I do not think it had been considered by the Government that preceded the Borden administration. When we came into office we found it there and we said: 'No, that never was the understanding of the agreement and we will not submit to it.' That was an Act which purported to make the United Kingdom Naturalization Act effective in Canada, so that by virtue of their legislation people would find themselves entitled to have their naturalization recognized in Canada. We took the position that we would not submit to that; that whoever was to be recognized in Canada as properly naturalized must be so under the enactment of the Canadian Parliament. It took us two years and a trip to England to get that acknowledged. Finally, it was acknowledged and now our legislation stands. The position we took was the validity of a naturalization in Canada must be accepted because it complies with all the provisions of the law of the Parliament of Canada. If the hon. gentleman will refer to the Naturalization Act he will see that was carried out."

legislation.[1] Later the United Kingdom amended their legislation, while in 1919 the Canadian Government introduced a new Act in which they endeavored to conform to the amended legislation of the United Kingdom. Several provisions of the new Act were vigorously opposed, but the Government refused to alter the Act because it was desired to keep the legislation of Canada and the United Kingdom uniform.[2] The next year after re-examination of the Act of 1919 it was found that there were two omissions of clauses that ought to have been inserted, and that there was a clause inserted which was not consistent with the legislation that had been agreed upon. Further, it was found that an alteration, which had been refused the previous year through an error, could be made without destroying the uniformity of the legislation. In view of the changes that would be necessitated in the Act of 1919 the Government deemed it advisable to repeal that Act, and to revive the Act of 1914, amending it as the Parliament of the United Kingdom had amended their Act of 1914, thus keep-

[1] Hansard, Vol. LV, Nos. 74 and 77.

[2] Hansard, Vol. LVI No. 19, Mr. Doherty: "We passed similar laws, and out of that there arose the necessity of our keeping our laws similar. It was not peculiar to our Parliament that it was said: We cannot very well deal with the question because we have no understanding that the Dominions will deal with it and we want to keep our laws similar. If the hon. gentleman will look at the debate on the Naturalization Act in the House of Commons of the United Kingdom he will find numerous suggestions with respect to which the Minister in charge of the Bill said: 'I think that is a good suggestion but you see we have not consulted with the Dominions and we want to avoid getting our laws different.' It was not a question of the United Kingdom telling us what we must do any more than a question of our telling them what they must do. It was a question of two peoples who wanted to keep their action in line to attain a common purpose. Therefore, on their side they tried to communicate with us before final action and we tried to communicate with them."

ing the legislation the same. Now, if a man "has the good fortune to be naturalized under Canadian law he is a naturalized British subject in Canada, and will be a naturalized British subject in the United Kingdom. He may not be in Australia or New Zealand, because they have not as yet passed the necessary legislation, and that is unfortunate."[1] The action in regard to naturalization not only clearly illustrates Canada's independent attitude, but it also affords an admirable example of the successful application of the principle of co-operation.

24. Nationals

As a result of Canada's membership in the League of Nations and more especially, of her participation in the organization of the International Court, it became necessary to define who were Canadian nationals. The King is king of the whole Empire: it is to him that all British subjects owe allegiance. But, besides this general allegiance owed to the Empire, each British subject may owe allegiance to the particular division of the Empire in which he resides. Hence, in 1921 the Canadian Parliament passed a Canadian Nationals Definition Act. This Bill did not in any way affect the status or position of any Canadian as a British subject. "Notwithstanding its enactment we shall all remain, of course, British subjects, and under the definition as proposed nobody will be a Canadian National who is not a British subject. But the purpose of the Bill is to define a particular class of British subjects, who, in addition to having all the rights and all the obligations of British subjects, have particular rights because of the fact that the are Canadians."[2]

[1] Hansard, Vol. LVI No. 19, p. 820. Mr. Doherty.
[2] Hansard, Vol. LVI No. 17, p. 679. Mr. Doherty.

Thus, according to the provisions of the Canadian Nationals Definition Act, 1921,[1] a distinctive Canadian nationality is recognized.

25. Honors

A subject on which Canada has taken independent action is that of honors. For various reasons a strong sentiment opposed to titles for Canadians developed in Canada. In 1918 two members of the party in power introduced in the Canadian House of Commons a measure abolishing titles of honor. The Cabinet had anticipated this measure by

[1] The following persons are Canadian Nationals:

1. (a) Any British subject who is a Canadian within the meaning of the Immigration Act, Chapter 27 of the Statute of 1910, as heretofore amended.

(b) The wife of any such citizen.

(c) Any person born out of Canada whose father was a Canadian National at the time of that person's birth, or with regard to a person born before the passing of this Act whose father at the time of such person's birth possessed all the qualifications of a Canadian as defined in this Act.

2. (a) Any person who by reason of his having been born in Canada is a Canadian National, but who at his birth, or during his minority became under the law of the United Kingdom or of any of the self-governing dominions of the British Empire a National also of that Kingdom or Dominion, and is still such a National, and

(b) any person who though born out of Canada is a Canadian National, may if of full age and not under disability, make a declaration renouncing his Canadian Nationality. Such declaration may be made before a notary public or other person authorized to administer oaths in the locality in which the declaration is made, and may be in the form set out in the schedule of this Act. The declarant shall transmit his declaration to the Secretary of State of Canada and upon the Secretary of State being satisfied of the sufficiency of the declaration and that it has been duly executed it shall be filed of record, whereupon the declarant shall cease to be a Canadian National, and a certified copy of the declaration shall be forwarded to the declarant with an endorsement thereon that the original declaration has been filed of record.

For schedule, see Hansard, p. 2108, Vol. LVI, No. 39.

passing an Order-in-Council providing that titles were to be given only upon the recommendation of the Canadian Government, that no hereditary titles were to be conferred in the future, and provisions were to be made whereby titles would expire upon the death of the holder. The private members' bill was pushed, and in the ensuing debate the overwhelming number of the members of the House of Commons expressed themselves in favor of the complete abolishment of titles. Sir Robert Borden then announced that the Government stood by its Order-in-Council which proposed to abolish *hereditary* titles eventually, and should Parliament legislate to abolish *all* titles eventually, his Government would have no other alternative but to resign. In the vote that followed the Governmental action was upheld by a division on strictly party lines. However, members of the majority intimated that when the question came up in the next session they would hold themselves free to vote against titles in spite of Governmental action.

In the Spring session of 1919 a committee was appointed to investigate the question and report thereon. The committee reported in favor of the eventual abolishment of titles. This was done by passing the following resolution:

"To the King's Most Excellent Majesty,
Most Gracious Sovereign.

"We, Your Majesty's most dutiful and loyal subjects, the House of Commons of Canada in Parliament assembled, humbly approach Your Majesty, praying that Your Majesty may be graciously pleased:—

"a. To refrain hereafter from conferring any title of honour or titular distinction upon any of your subjects domiciled or ordinarily resident in Canada, save such appellations as are of professional or vocational character, or which appertain to an office.

"b. To provide that appropriate action be taken by legislation or otherwise to ensure the extinction of an hereditary title of honour or titular distinction, and of a dignity or title as a peer of the realm, on the death of a person domiciled or ordinarily resident in Canada at present in enjoyment of an hereditary title of honour or titular distinction, or dignity or title as peer of realm, and that thereafter no such title of honour, titular distinction or dignity or title as a peer of the realm, shall be accepted, enjoyed or used by any person or be recognized."

The language and form employed is that of a subservient House of Commons, the spirit and action is that of a sovereign Parliament. In the case of Honors, as in the case of fiscal and trade policies, of defense, of immigration, of merchant shipping, and of copyright Canada has assumed an independent position.

CHAPTER III

CONNECTIONS WITH GREAT BRITAIN

26. The Crown

The importance of the kingship in the British Commonwealth of Nations as at present constituted can not be overestimated.[1] The Crown is the symbol of unity. "The Crown is to be considered as one and indivisible throughout the Empire, and cannot be severed into as many distinct kingships as there are Dominions and self-governing colonies."[2] In the British Empire[3] the kingship is the visible unifying bond. This was recognized in Canada at an early date. When the Canadian Provinces were considering federation one question that arose was concerning the designation of the new union. Sir John A. Macdonald desired to have the federation called "The Kingdom of Canada"—Canada to possess the same king as the United Kingdom. In this way union would be preserved and as an independent Canadian

[1] cf. Walter Bagehot's Works, Vol. IV, Chaps. 3 and 4.

[2] Lefroy, p. 60; see also Lefroy, p. 167, note 36.

[3] The terms "British Commonwealth of Nations" and "British Empire" are used interchangeably to designate the political entity over which George V is King. Cf. the "Irish Agreement," Articles I and IV. For a criticism of the use of these terms, see Ewart, "The Subsidiary Imperial Conference 1921," pp. 25-27.

spirit developed there would be no feeling of subserviency to another country. Deference to opinion in the United States, where strenuous objections might have been raised to the establishment of a kingdom at its very doors, led to the choice of the designation "Dominion" in the preference to "Kingdom."[1] The kingdom idea was advocated and expanded in the "Kingdom Papers," written in 1904-14 by Mr. John S. Ewart, K. C. of Ottawa, Canada. Mr. Ewart, desiring to rouse "his fellow-countrymen to a sense of political dignity—to elevate them from the degrading slough of colonialism, and to give to them a position of honorable equality with the other nations of the earth,"[2] advocated the virtual independence of the various component parts of the Empire, each being established as a kingdom, and all having the same person as king—thus preserving the form of unity.

But in the time of Sir John A. Macdonald and in the time of Mr. Ewart's advocacy of the Kingdom of Canada there were many other ties binding Canada to the United Kingdom; the need of emphasizing the King's position was not appreciated generally. The Governor-General functioned partly as an Imperial Officer, he had the right to reserve measures, the Imperial Government could disallow Canadian

[1] At the Quebec Convention, 1864, the Fathers of Confederation" seemed to be unable to agree upon a designation for the proposed union. One of the "Fathers," Mr. (afterwards Sir), S. L. Tilley, after the day's discussion went to his room and as was his custom he read his Bible before retiring. He happened to read Zechariah IX, 10, in which it is written: "his dominion shall be from sea even to sea, and from the river even to the ends of the earth." The word "dominion" struck him as an appropriate designation for tho new union. It was proposed and adopted the next morning.

[2] "Kingdom Papors," Vol. II, p. 267.

legislation, Acts repugnant to imperial legislation were void, the Imperial Parliament could legislate for Canada, the Judicial Committee of the Privy Council of the United Kingdom was the final Court of Appeals, Canada could function internationally only through the Government of Great Britain, and finally, imperial troops were present in Canada. These bonds gradually disappeared, and of them, only two remain, and they in a modified form. One is the Governor-General. But he no longer possesses important duties as an imperial officer. His imperial function is that he is the personal representative of the king. This was emphasized by the appointment of a member of the Royal Family as Governor-General in Canada. The other tie is the right of appeal to the Privy Council.[1] This privilege, which rests upon the myth of the right to appeal to the foot of the throne,[2] has been greatly curtailed and is in danger of complete abolition. As these various bonds disappeared, fear for the unity of the Empire arose. Two alternatives presented themselves; federation, or the kingdom idea, that is, unity through a common king.[3] Apprehensive of the propaganda waged by those desiring Imperial Centralization or Federation, Mr. Ewart discarded the idea of unity through a Kingdom of Canada, and began to advocate the independence of Canada both in fact and in form through the establishment of a Republic of Canada.[4] Opposition to Imperial Federation

[1] See infra., Sec. 31.

[2] Mr. W. E. Raney, Attorney-General of Ontario, in an address to the Toronto Board of Trade. Quoted in the "Toronto Globe," January 12, 1921.

[3] cf. Jebb, "The Britannic Question."

[4] See Kingdom Papers," Vol. II and subsequent "Independence Papers."

increased,[1] and finally centralization was proclaimed dead, officially, as far as Canada is concerned. On February 22, 1921, the Minister of Justice declared in the Canadian House of Commons: "My hon. friend raised the ghost that we thought had long since been laid, the ghost with which they seek to terrorize the people of Canada, the ghost of some central organization," and he went on to quote the Prime Minister, Mr. A. Meighen, who, in an address in the city of Montreal, said: "I don't know any one with the slightest importance either here or anywhere else who wants Imperial Centralization. It is a long, long time since any such system was even seriously talked of, and no one has done more to make anything like centralization control forever impossible and to point a more excellent way to the British family of nations than has the man who led this country through the war, whose principle of full autonomy I adhered to then and sanction now."

The severance of various ties binding Canada to the United Kingdom, the weakening of others and the failure of the Imperial Federation movement have enhanced the King's position as the visible unifying bond. Realization of this fact, coupled with approval of the Monarch's actions, has increased the feeling of attachment to the King. He is regarded, "not as a part of a dominant Government, but as the symbol of a unity which depends ultimately on sentiment."[2] Any action which increases the feeling of attachment to the King naturally assists in preserving the unity

[1] For an expression of English opposition to Federation, see Dicey, pp. lxxiii-xci. For other views, see Hall, "British Commonwealth of Nations," p. 204-215.

[2] Keith, "War Government," p. 46.

of the Empire. Hence Keith states that if it were possible for the sovereign to pay periodic visits to the Dominions, the value of such a procedure would be extremely high, and he further asserts that the value of the visits of the Prince can hardly be exaggerated.[1] Canadians unhesitatingly swear allegiance to the King, voluntarily they declare on oath that they will defend him and his heirs for all time to come, fervently they sing, "God Save the King." Abolish the kingship, Canadians would hesitate to swear allegiance to Great Britain, many would not voluntarily declare on oath that they would protect and defend Great Britain for all time to come, and instead of one national anthem for the Empire there would be separate ones for each part.

But the kingship is important as the unifying bond not alone on account of any sentiment that may exist for the King, but also because it is to him that all British subjects owe allegiance.[2] "The visible bond is the Kingship. We are subjects of the King. We are not subjects of Downing Street or Westminster Hall; we are in no sense under the

[1] Keith "War Government," p. 46.

[2] The significance of the King's position as the unifying bond is illustrated by the Irish Agreement, in which it is provided that the oath to be taken by the members of Parliament of the Irish Free State shall be in the following form: "I do solemnly swear true faith and allegiance to the Constitution of the Irish Free State as by law established, and that I will be faithful to his Majesty King George V., and his heirs and successors by law, in virtue of the common citizenship of Ireland with Great Britain and her adherence to and membership of the group of nations forming the British Commonwealth of Nations."

Government of Great Britain."[1] It is by virtue of this common allegiance to the King that all British subjects possess a common nationality. Abolish the kingship, and, federation being dead,[2] there would be no satisfactory method of securing a common allegiance or a common nationality. The King's position is also rendered important because the various Governments in the Empire are carried on in his name. All legislation is enacted in his name, and through power theoretically derived from him. The kingship is the quintessence of the form that enables the British Empire to exist.

Possibly more important than any of these is the essential role played by the King in international affairs. It is through the King that the British State appears as a unity, yet it is through him that Canadians, as representatives of His Majesty, conclude treaties in his name on behalf of Canada.[3] Without the kingship there would be no way of preserving the unity of the whole, while maintaining the independence of the parts; the legal shield or screen behind which the conventions of the constitution operate would disappear. The kingship has come to occupy such an important place in the constitution of the British Commonwealth of Nations that to abolish it would most likely mean disintegration. That dignity is the key-stone of the whole

[1] Mr. Raney, quoted in the "Toronto Globe" January 12, 1921.

[2] Prophecy is a dangerous thing. It is doubly hazardous when it concerns the future of the British Empire. Although Federation appears to be dead, it is possible, though very improbable, that in the event of the abolition of the kingship and the attendant certainty of disintegration, there might be a reversal of present sentiment, and that centralization would be accepted as the means of keeping the British Commonwealth of Nations together.

[3] See infra. Chap. IV.

system, it is the link that binds;[1] remove it and the structure would collapse. Recognition of the kingship as the unifying bond, recognition of the fact that retention of that office preserves the form of Empire and unity, while permitting the fact of a Commonwealth of Nations, will assist one in understanding the confusing and apparently ambiguous anomalies that exist in the relations of Canada to the United Kingdom and to other countries.

27. The British Parliament

Nowhere in the governance of the British Empire does form differ so greatly from practice as it does in the position of the Parliament of the United Kingdom. Theoretically that body is still an Imperial Parliament. Dicey says: "the Imperial Parliament still claims in 1914, as it claimed in 1884, the possession of absolute sovereignty throughout

[1] The Imperial Conference, 1921, presented the following address to His Majesty: "We, the Prime Ministers and other Representatives of the British Empire, speaking on behalf of the United Kingdom, the British Dominions, the Indian Empire and the British Colonies and Protectorates, desire, on the eve of concluding our meeting, to present our humble duty to Your Majesty and to reaffirm our loyal devotion to Your Throne. We have been conscious throughout our deliberations of a unanimous conviction that the most essential of the links that bind our widely-spread peoples is the Crown, and it is our determination that no changes in our status as peoples or as Governments shall weaken our common allegiance to the Empire and its Sovereign.

"Knowing your Majesty's deep interest in all that touches Your people's happiness, we trust that our labours in this time of world-wide unrest may be satisfactory to you and conduce to the welfare and safety of Your dominions as well as to the peace of the world.

"We pray that Your Majesty and the Queen may long be spared to enjoy the affection of Your subjects and to see all classes equally recovered from the strain and sacrifice of the War."

every part of the British Empire; and this claim, which certainly extends to every Dominion, would be admitted as sound legal doctrine by any court throughout the Empire which purported to act under the authority of the King. The constitution indeed of a Dominion in general originates in and depends upon an Act, or Acts, of the Imperial Parliament; and these constitutional statutes are assuredly liable to be changed by the Imperial Parliament."[1] In theory this is undoubtedly true. The British North America Act is an Act of the Parliament of the United Kingdom—that body has the legal power to amend or to repeal that Act. According to its provisions the Canadian Parliament is subordinate to the Imperial Parliament. The Parliament of the United Kingdom has the legal power to legislate for Canada, just as the King has the legal power to veto any Act passed by the British House of Commons and the House of Lords. In form the Imperial Parliament is sovereign.[2]

This legal sovereignty has been limited in various ways. In the first place it has been limited by the nature of things. It is impossible for Parliament to exercise as much absolute authority in Canada as it does in England. Burke urged recognition of this limitation in his attempt to effect a conciliation with the American Colonies. He argued: "In large bodies, the circulation of power must be less vigorous at the extremities. Nature has said it. The Turk cannot govern Egypt, and Arabia, and Curdistan, as he governs Thrace; nor has he the same dominion in Crimea and Algiers which he has at Brusa and Smyrna. Despotism itself is obliged to truck and huckster. The Sultan gets

[1] Dicey, p. xxv. See also Lefroy, p. 50.

[2] See Dicey, Part I, Chap. 1, and Introduction, pp. xviii-xxxvii.

such obedience as he can. He governs with a loose rein, that he may govern at all; and the whole force and vigor of his authority in the centre is derived from a prudent relaxation in all his borders. Spain in her provinces, is, perhaps, not so well obeyed as you are in yours. She complies too; she submits; she watches times. This is the immutable condition, the eternal law, of extensive and detached empire."[1] The passionate words of Burke failed to move Parliament. But a war, and the loss of the American Colonies, convinced them that the nature of things actually did limit the omnipotence of Parliament.

The extent to which fact and constitutional practice have shorn the Imperial Parliament of many of its legal powers has been shown in the preceding chapter. Two more powers remain to be considered. The one is the power to repeal or amend the British North America Act; the other is the general power to legislate for Canada. Concerning the actual limitations of the sovereign power of Parliament Dicey writes that "the actual exercise of authority by any sovereign whatever, and notably by Parliament, is bounded or controlled by two limitations. Of these the one is an external, the other is an internal limitation. The external limit to the real power of a sovereign consists in the possibility or certainty that his subjects, or a large number of them, will disobey or resist his laws."[2] This external limit greatly restricts the exercise by the Imperial Parliament of both the above-mentioned powers. As early as 1843 the legislature of Canada notified the Imperial Parlia-

[1] Burke, "Conciliation with America," ed. 1808, Vol. III, pp. 56, 57.
[2] Dicey, p. 74.

ment that the Copyright Act passed by it would not be enforced. In 1920 Mr. N. W. Rowell declared in the Canadian House of Commons: "The British Government could repeal the British North America Act. They have the legal right to do so, but they have no constitutional authority to do so, it would provoke a revolution if they exercised their legal right so far as the British North America Act is concerned."[1] In 1921, when one member of the Canadian Commons suggested that the Imperial Parliament had the power to wipe the British North America Act off the statute books with a single stroke of the pen, another member interjected: "Then we shall make another for ourselves."[2] Undoubtedly the external limits to the real power of a sovereign—the certainty of disobedience and of revolution — thoroughly restrict any legal or theoretical sovereignty Great Britain may have over Canada. Besides these external limitations there are restrictions imposed by practices which have developed into customs of the constitution.

It is generally admitted that if Canada so desired she could have the right to amend the written part of her constitution — a right possessed by the other Dominions. But the Provinces have not been able to agree on a satisfactory method of amending. The Province of Quebec, jealous of her rights, would not consent to such a proposal unless it was provided that amendments must be approved by all the

[1] Revised Hansard, p. 360, March 11, 1920.

[2] Mr. McMaster; Hansard, LVI, No. 45, p. 2480.

Provinces. Other Provinces, and especially Ontario, would oppose such a provision on the plea that Quebec could thwart the wishes of English-speaking Canada. The Parliament of Great Britain is ready, at the wish of Canada, to admit the Dominion's right to amend the written part of its own Constitution.[1] But Canada, for want of agreement on the part of the Provinces, has allowed the present form to remain. While this form may appear somewhat derogatory to Canada, in fact it has not proven so. In fact no amendment to the British North America Act demanded by Canada has ever been refused. Further, no attempt has been made to pass an amendment without a previous request from Canada. Both Governments carefully adhered to the practice that the British North America Act could be amended only at Canada's request and that all amendments desired by Canada must be enacted. This practice has been established to such an extent that it has overriden the form, and, while the Imperial Parliament has the legal power to repeal or amend the British North America Act without consulting Canada's wishes, it no longer has the constitutional right to do so.[2]

Neither has the Parliament of the United Kingdom the constitutional right to legislate for the Dominion of Canada. It has been shown in the preceding chapter that the Imperial Government, in the case of repugnancy to Imperial Laws,

[1] cf. Dicey, p. xxxi.

[2] This has been asserted on many occasions in the Canadian House of Commons, e. g., see the debate quoted supra, p. 16.

of Merchant Shipping, of Naturalization, and of Copyright gradually withdrew from its untenable position, abandoned its claim that it could legislate for Canada, and acquiesced in the Dominion's contention that only the Parliament of Canada could legislate for the people of Canada. No point has been insisted upon more strenuously by Dominion statesmen. General Jan C. Smuts declared, in the Union Parliament, that the Imperial Parliament no longer had the right to legislate for the Union.[1] Sir Robert Borden also urged this point. He affirmed that "with the material growth and constitutional development of the oversea nations the Parliament of the United Kingdom has ceased to be an Imperial Parliament in any real sense so far as the Dominions are concerned. Its legal power is subject to the limitations of constitutional right. Theoretically it has power to impose direct taxation or compulsory military service upon the people of any Dominion; constitutionally and practically it possesses no such right or authority. The exercise of any power contrary to established or developing conventions would have legal sanction, but would not be respected, and in the end could not be enforced." Mr. Doherty, as Minister of Justice, declared that every statesman of the United Kingdom recognized the fact that the Empire was composed of a Commonwealth of Nations and that there belonged to no one of those nations the right to

[1] Keith, "Dominion Home Rule," p. 57.

dominate over another.[1] He also stated the general policy upon which the Canadian Government acted, namely, that the only legislation valid in Canada was legislation enacted by the Canadian Parliament.[2] Mr. Rowell also asserted that the Imperial Parliament had no more right to legislate for Canada than the Canadian Parliament had to legislate for England.[3] Lord Milner, the Colonial Secretary, declared that "the dominions are in no real sense nowadays under the United Kingdom"[4] and referred to the Imperial Parliament's right to legislate for the Dominions as long since obsolete.[5] Professor G. M. Wrong, of the University of Toronto, writes:[6] "The Parliament of Great Britain has no constitutional right to pass any measure affecting the government of Canada, except merely as registering Canada's own decisions."

No usage has become more established in British Constitutional practice than this custom, that the Parliament of the Kingdom no longer has the right to legislate for the Dominions.[7] The omnipotence, in short, of Parliament has become a mere fiction.[8] The Parliament of the United Kingdom has been shorn of its power to amend the British North

[1] Hansard, LVI. No. 7, p. 200.

[2] Hansard, LVI. No. 19, p. 821.

[3] Hansard, LVI. No. 45, p. 2480.

[4] Viscount Milner, "The British Commonwealth," p. 4.

[5] Viscount Milner, op. cit. p. 11.

[6] Wrong, "The United States and Canada," p. 126.

[7] cf. Mr. Rowell's statement, supra p. 16.

[8] Dicey, p. xxvii.

America Act or to legislate for Canada without that Dominion's previous request. Its theoretical sovereignty is completely limited, as far as Canada is concerned, by the nature of things, by the certainty of disobedience and revolution, and by constitutional practice.

28. Co-operation

The Parliament of the United Kingdom is not omnipotent throughout the Empire. The King is the only visible bond of unity. What then enables these different countries to exist together in a more or less loose association? There are two causes. One is the absence of a strong desire, on the part of Canada, for separation; the other is the willingness of the Governments to co-operate. The statement that: "The great mass move on with very indefinite purposes, and not much inquiring whither they are going," is just as true of the majority of Canadians today as it was in 1850 when Lord Elgin penned it.[1] There are small energetic groups of Canadians who advocate various proposals concerning Canada's political destiny. But the majority of Canadians do not seem to be concerned about Canada's present or future status.

It is because of this lack of interest in the actual government that the Empire is enabled to continue as it does at present. Development of such interest would lead to the formation of opinion either in favor of preservation of the British connection, or in favor of independence. If the

[1] Lord Elgin to Earl Grey, March 23, 1850.

former desire became overwhelmingly strong the time would be ripe for Federation; if it merely predominated then an agitation would arise for an Imperial Constitutional Conference to clear up apparent anomalies in intra-imperial relations and establish the Commonwealth of Nations on a legal basis. If the independence idea became the stronger then the visible bond—the kingship—would not suffice to preserve unity.

While the mass of people apparently care not "whither they are going" successive Canadian Governments have all evinced a desire to co-operate with the other Governments in the Empire and thus preserve unity. This principle of co-operation[1] obtained an effective start in the Colonial Conference of 1887. It developed at the subsequent Conferences of 1894, 1897, 1902, 1907.[2] At the latter Conference the following constitution was agreed upon:

"That it will be to the advantage of the Empire if a Conference, to be called the Imperial Conference, is held every four years, at which questions of common interest may be discussed and considered as between His Majesty's Government and the Governments of the self-governing Dominions beyond the seas. The Prime Minister of the United Kingdom will be *ex officio* President, and the Prime Ministers of the self-governing Dominions *ex officio* members, of the Conference. The Secretary of State for the Colonies will be an *ex officio* member of the Conference, and will take the chair in the absence of the President. He will arrange for such Imperial Conferences after communication with the Prime Ministers of the respective Dominions.

"Such other ministers as the respective Governments

[1] Borden, pp. 58-61; 107-115.

[2] See Keith, Part VIII, Chap. II.; Jebb, "The Imperial Conference."

may appoint will also be members of the Conference, it being understood that, except by special permission of the Conference, each discussion will be conducted by not more than two representatives from each Government and that each Government will have only one vote.'' Another Conference was held in 1911.[1] The conference of 1915 was postponed on account of the war. Then in 1917 and 1918 Imperial War Conferences were held.[2] The Conference of 1917 passed the following resolution:

''The Imperial War Conference are of the opinion that the readjustment of the constitutional relations of the component parts of the Empire is too important and intricate a subject to be dealt with during the war, and that it should form the subject of a special Imperial Conference to be summoned as soon as possible after the cessation of hostilities.

''They deem it their duty, however, to place on record their view that any such readjustment, while thoroughly preserving all existing powers of self-government and complete control of domestic affairs, should be based upon a full recognition of the Dominions as autonomous nations of an Imperial Commonwealth, and of India as an important portion of the same, should recognize the right of the Dominions and India to an adequate voice in foreign policy and in foreign relations, and should provide effective arrangements for continuous consultation in all important matters of common Imperial concern, and for such necessary concerted action, founded on consultation, as the several Governments may determine.''

During the years 1917 and 1918 a species of Imperial Council was inaugurated in the meetings of the Imperial War

[1] See Keith, ''R. G. in D.'' Part VII, Chap. III.

[2] See Keith, ''War Government,'' pp. 36-46.

Cabinet. This development proved transitory, and did not live beyond the war period.[1]

A ninth Conference was held from June 20th to August 5th, 1921.[2] This Conference, after agreeing upon various matters, adopted the following resolution:

"The Prime Ministers of the United Kingdom and the Dominions, having carefully considered the recommendation of the Imperial War Conference of 1917 that a special Imperial Conference should be summoned as soon as possible after the War to consider the constitutional relations of the component parts of the Empire, have reached the following conclusions:

"(a) Continuous consultation, to which the Prime Ministers attach no less importance than the Imperial War Conference of 1917, can only be secured by a substantial improvement in the communications between the component parts of the Empire. Having regard to the constitutional developments since 1917, no advantage is to be gained by holding a constitutional Conference.

"(b) The Prime Ministers of the United Kingdom and the Dominions and the Representatives of India should aim at meeting annually, or at such longer intervals as may prove feasible.

"(c) The existing practice of direct communication between the Prime Ministers of the United Kingdom and the Dominions, as well as the right of the latter to nominate Cabinet Ministers to represent them in consultation with the Prime Minister of the United Kingdom, are maintained."

This willingness to co-operate is not only manifested in the Imperial Conferences. It is evinced by the granting of an Imperial Preference, and by action with regard to the contentious subjects of Copyright and Naturalization, upon

[1] See Keith, "War Government," pp. 27-35.

[2] See summary of the Transactions of the Conference of Prime Ministers.

which subjects legislation in Canada and the United Kingdom is practically uniform. The kingship is the visible bond of unity, and as such its importance cannot be overestimated. But absence of desire, on the part of the people, for separation, and the willingness, on the part of the Governments, to co-operate are the means by which the visible link is enabled to hold the Empire together. True, without the kingship the Empire would collapse,[1] but even the kingship, without co-operation between the Governments, would be unable to maintain the unity of the British Commonwealth of Nations.

29. Foreign Policy

The fact that outwardly the British State appears as a unit[2] under one Sovereign makes an intra-imperial understanding concerning foreign policy necessary.[3] A study of the foreign policies of Canada and the Empire convinces one that the subjects with which the general policy deals may be sub-divided under two heads, namely, matters primarily of economic concern, and matters which, although they may be the result of economic causes or may entail economic consequenses are nevertheless matters of political concern, or as they are sometimes termed, "high politics." Under the former heading would come such matters as foreign policy with regard to trade, immigration and control of natural

[1] See supra, p. 67.

[2] Although the British State appears as a unit, it does not always act as such, e. g. see the Report of Proceedings of the First Meeting of the Assembly of the League of Nations for instance of the various parts of the Empire voting on opposite sides.

[3] Cf. Borden, pp. 87-93; 115-116.

resources. Under the latter head would come such questions as the Anglo-Japanese Alliance, the North Atlantic Fisheries dispute, the pre-war policy toward the Triple Alliance, etc.

In the case of matters primarily of economic concern Canada's right to decide her policy towards foreign countries has been established for some time. Canada has complete control over her tariff, over her trade and over immigration and emigration — matters of prime concern in the foreign policy of any country. Hall, in his "British Commonwealth of Nations" recognized this. He wrote: "Over the complex of everyday international relationships they (the Dominions) had almost as much control as the people of the United Kingdom. Above all they had control over the two questions which more and more are becoming for all countries the burning centre of foreign policy — trade and immigration. They framed their own tariffs, negotiated their own commercial treaties, and enacted and administered their own immigration laws. In the light of these facts, and of the existence of Dominion armies and navies, the saying already quoted that the Dominions had no kind of 'political control of the policy which involved them in peace or war' seems to miss the substance and to strike at a shadow. At least they had control of the issues which might lead them and the rest of the Empire to the very brink of war, only requiring the seals of the British Foreign Office to thrust the Empire formally over the edge."[1]

Under the vague theory of trusteeship, the Government of the United Kingdom conducted for many years the more important questions touching the foreign relations of the Empire.[2] Then as matters such as the Fisheries dispute

[1] H. D. Hall, "British Commonwealth of Nations," p. 147.

[2] Sir Robert Borden, Hansard, LVI, No. 49, p. 2720.

and the Alaskan Boundary question became acute, Canada was accorded a representation upon the commissions that were to effect a settlement. The degree of Canada's influence in negotiating the Treaty of Washington, 1871, which, through the provisions of Articles xviii-xxv, effected a new fisheries arrangement, can be judged from excerpts of letters written by the sole Canadian representative, Sir John A. Macdonald. On March 29, he wrote: "My long telegram of the 22nd will have informed you of the state of fishery matters up to that time. You may imagine that my position was exceedingly embarrassing. In our separate caucusses my colleagues were continually pressing me to yield — in fact, I had no backer, and I was obliged to stand out, and, I am afraid, to make myself extremely disagreeable to them." Later, on April 1, he wrote: "I must say that I am greatly disappointed at the course taken by the British Commissioners. They seem to have only one thing in their minds—that is, to go home to England with a treaty in their pockets, settling everything, no matter at what cost to Canada." While on May 6, he wrote as follows:[1] "In addition to the letter which I shall send to Lord Grenville, and which will be such as can be published, I shall prepare a letter to him marked 'secret' pointing out the sacrifices which Canada has been called upon to make. I shall do this because, if the manner in which Canada has been treated by England were fully known to the Canadian people, I am afraid it would raise an annexation storm that could not easily be allayed."

The tribunal which settled the Alaskan boundary dispute in 1903 was composed of three citizens of the United States and three subjects of the British King, of whom one was the Lord Chief Justice of England, the other two being Canadians. The controversy was settled in favor of the

[1] Quoted in Ewart, "Kingdom Papers," Vol. II, p. 357.

United States; the English member voting to uphold the American contentions. Even though Lord Alverstone acted purely in a judicial capacity[1] and decided according to the merits of the question, nevertheless the feeling was quite predominant in Canada that, had the commission contained three Canadians, instead of two Canadians and one Englishman, Canada would have obtained better terms.

In the control of "high politics" in general the Canadian Government desired no share. Sir Wilfrid Laurier, at the Imperial Conference of 1911, speaking on the Australian resolution regretting lack of Dominion participation in foreign policy, said: "That is a thing which, in my humble judgment, ought to be left altogether to the responsibility of the Government of the United Kingdom. You ought not to give advice unless you are prepared to back that advice with all your strength."[2] This the Canadian Government was not prepared to do, as their contention was that Canada reserved the right to decide whether or not she would participate in an Imperial war. At this same conference, however, the Imperial Government took the Dominion statesmen into their confidence, admitting them to the *arcana imperii,* and explaining all the secrets and intricacies of British Foreign Policy. In the autumn of 1911 the Government of Sir Wilfrid Laurier was succeeded by that of Sir Robert Borden. The new Government, believing that when the Empire is at war Canada is at war, and that to accept

[1] cf. J. B. Moore, "American Diplomacy," p. 320.
[2] Quoted, Hansard, LVI, 49, p. 2758.

the benefits of union in time of peace and shirk the responsibilities of union in time of war would be dishonorable, held that Canada was in honor bound to participate in all Imperial wars. And as foreign policy might result in war, therefore Canada should have a share in its control.

Sir Robert Borden labored towards this end diligently, with the result that Canada obtained an ever-increasing voice in the conduct of foreign affairs.[1] Finally the Imperial Conference of 1917 resolved that any readjustment of the constitutional relations of the component parts of the Empire should recognize the right of the Dominions and India to an adequate voice in foreign policy and in foreign relations, and should provide effective arrangements for continuous consultation in all important matters of common Imperial concern, and for such necessary concerted action, founded on consultation, as the several Governments may determine.

Canada's independence in the conduct of her own foreign affairs was vehemently asserted at the first meeting of the Assembly of the League of Nations. "It is not that we have not the greatest respect and admiration for European statesmen, but simply that they do not understand our point of view. Even the statesmen of the mother country, for whom we have the greatest respect and affection, we do not permit to settle Canadian affairs. We settle them for ourselves. You may say that we should have confidence in European statesmen. Perhaps we should. But it was European statesmen, European policies and European ambitions that drenched the world in blood and from which

[1] See infra Chapter IV.

the world is suffering and will suffer for generations. Fifty thousand Canadian soldiers under the soil of France and Flanders is what Canada has paid for European statesmanship. Therefore, I submit that we have no right in this International Assembly to part with our control in these matters.''[1]

Concerning foreign policy the official report of the Conference of 1921 says, in part:

''The conference then addressed itself to a detailed consideration of the Foreign Policy of the British Empire. The discussion on this was opened by the Secretary of State for Foreign Affairs, who made an exhaustive statement upon the course of foreign affairs since the Peace Conference. His statement was supplemented by Mr. Churchill, who dealt with the special problems of the Middle East.

''There followed a series of important discussions, which were largely conversational in form, each representative intervening in turn as occasion prompted, without formality of any kind, The objects in view were threefold: first, that the members of the Conference should all put their ideas into the common stock and thus gain a thorough understanding of each other's point of view; second, that the principal questions of foreign policy should be examined by this means from every point of view; and third, that there should be a free and full discussion of the general aims and methods to be pursued. The discussions, which covered the whole area of foreign policy, and extended over many days, proved most fruitful in all these respects. They revealed a unanimous opinion as to the main lines to be followed by British policy, and a deep conviction that the whole weight of the Empire should be concentrated behind a united understanding and common action in foreign affairs. In this context, very careful consideration was given to the means of circulating information to the Dominion Governments and keeping them in continuous

[1] Mr. Rowell. For his explanation of this statement, see Hansard LVI, No. 49, p. 2759.

touch with the conduct of foreign relations by the British Government. It was unanimously felt that the policy of the British Empire could not be adequately representative of democratic opinion throughout its peoples unless representatives of the Dominions and of India were frequently associated with those of the United Kingdom in considering and determining the course to be pursued. All members of the Conference expressed a vivid sense of the value of this year's meeting in that respect, and a desire that similar meetings should be held as frequently as possible.''

The report then goes on to tell of the agreements reached with regard to the Anglo-Japanese Alliance and the Washington Conference for the Limitation of Armaments, and of the participation of the Dominion Premiers in the Cabinet discussions with regard to the Silesian question.

In October 1921, Sir Robert Borden stated that the resolution of 1917 was based upon vital considerations which could not lightly be disregarded. And while it was true that the Dominions were represented at Paris, that they took their place at the Peace Conference, and that they became signatories of the Peace Treaty, he said he had yet to learn that since the conclusion of peace the right of the Dominions to ''an adequate voice in foreign policy and in foreign relations'' had been recognized in any effective or practical way.[1] He remarked that since the war high politics had been conducted by the Foreign Office of Great Britain, and he added, ''That is not what we intended.''[2]

Since then the Liberal Party has been returned to office in Canada. The Debates of the Session of 1921 show clearly that at that time the Liberal Party still held to Sir Wilfrid Laurier's opinion.[3] It may be expected that they will con-

[1] cf. Borden, p. 115.

[2] Borden, Lecture.

[3] See particularly, Hansard, Vol. LVI, No. 49.

tinue to do so now that they are in power. The advances made by the Government of Sir Robert Borden have given Canada control over her own foreign affairs and a large share in the conduct of Imperial foreign affairs. This advance coupled with the dictum of Sir Wilfrid Laurier means that while Canada retains complete control of her own foreign policy, as far as Imperial foreign policy is concerned, she will hold herself responsible only for action in which she has concurred.

30. Imperial War

Closely connected with the subject of foreign policy is that of war. Canada's position of practical independence, coupled with the obligations she has assumed by entering into the League of Nations, has given rise to many hypothetical questions regarding Canada's position in the event of war. These questions, usually, do not concern themselves with declarations of war upon the Empire, because it is realized that, should a country declare war on the British Empire, that country would have a legal right to attack Canada as a part of the Empire, and should that occur there is very little doubt as to what Canada's action would be. The questions usually assume some sort of aggression on the part of the British Empire or one of its component parts. If Great Britain declared war upon a European country, what would Canada's position be? If a Pacific Dominion engaged in hostilities with a Pacific Power, would that involve Canada?

There are two interpretations as to Canada's position in

the event of an Imperial war. These constructions, while different, spring from the same principle. The one is the interpretation of Sir Wilfrid Laurier. He continually insisted upon autonomy and self-government. He proclaimed Canada's right to control her own destiny, and asserted the principle that Canada reserved the right to determine whether or not she would participate in Imperial wars. According to this construction the conduct of Imperial foreign affairs was in the hands of Great Britain. If Imperial High Politics led to war, Canada, not having assisted in their formation, was not bound to participate in the war. The King, on the advice of the Cabinet of Great Britain, had the power to declare war. Then, war having been declared, Canada had the right to decide whether she would participate in that war or not. Sir Wilfrid Laurier's position was that the decision to wage war rested with Canada. Since the formulation of this policy the Empire has passed through a great war, and, as a result of participation in that war Canada has reached the goal of complete self-government—of virtual independence. This advancement in status has caused an alteration in the constitution of the Empire—it has increased the powers of the Dominion parliaments at the expense of the parliament of the United Kingdom. This change in intra-imperial relations has developed and given weight to another construction as to Canada's position in the event of an Imperial war; that is the interpretation of Sir Robert Borden, the man who, as Prime Minister, guided Canada through the war.

Sir Robert Borden contends that the Empire cannot go to war in parts—that the King's declaration of war binds the whole Empire. He emphasizes the fact that Canada has

attained the status of a nation and that she stands on a footing of equality with Great Britain as a nation in the British Commonwealth of Nations. Over this entity there is one King, in whose name all acts are performed. This King is a constitutional monarch, who acts upon the advice of his ministers. Before the Dominions attained their present status this duty of advising the King was performed by the Ministry in Great Britain, and thus action taken by the King on their advice became binding on the whole Empire. With the elevation of the Dominions to a status of equality with Great Britain, the Canadian Cabinet was placed upon a footing of equality with the Cabinet of the United Kingdom. The Constitutional advisers of His Majesty are no longer simply the Cabinet Ministers of the United Kingdom, but they are the Cabinet Ministers of all the Nations comprising the British Commonwealth of nations. Action taken by His Majesty, to be constitutionally binding upon the whole Empire, must be taken on the advice of all his ministers. Hence, constitutionally, the King may no longer declare war solely upon the advice of the Cabinet of Great Britain; he must have the advice of all the Cabinets. Should the King declare war upon the advice of the Government of Great Britain the action would be contrary to the constitution of the Empire, and Canada would be free to do as she saw fit. Sir Robert Borden's position is that the decision to wage war rests with Canada.

The difference between this construction and that of Sir Wilfrid Laurier's is in the manner in which they are applied. According to Sir Robert Borden's interpretation the Canadian decision would precede a declaration of war. If Canada advised a declaration, and a declaration ensued,

she would be obliged to wage war. If she failed to tender advice, or if she advised against a declaration, and one was promulgated, that action would be contrary to the constitution of the Empire. Then, that consitution having been abrogated, Canada would possess the right of liberty of action. According to Sir Wilfrid Laurier's position the Canadian decision would follow a declaration of war and Canada would not be obliged to wage war unless she so decided. While the two interpretations differ in the method of application, in the final analysis they are the same: the decision to wage war rests with Canada. Both interpretations spring from the same principle — the principle of responsible self-government, the principle that the authority which acts or speaks for any country is responsible to, and must act in accordance with, the wishes of the people of that country. Hence, should Great Britain, or one of the Dominions, declare war on a foreign country, that action would not obligate Canada to wage war.

31. Privy Council

The possibility of appeal from the decision of a Canadian Court to the Judicial Committee of the Privy Council[1] of the United Kingdom is a much discussed bond connecting

[1] See: Keith, "R. G. in D." pp. 1357-1385.
Keith, "Imperial Unity," Chapter XVI.
Keith, "War Government in the Dominions," pp. 285-288.
Scott, "Canadian Constitution," pp. 121-123; 125; 129-131.
Lefroy, p. 263.

Canada with the United Kingdom. The Privy Council had its origin in the Concilium Regis, a small body of administrators which developed within the King's Council. As this latter Council was the highest court of judicature for great cases and great men, the former council claimed and exercised that function. From the thirteenth to the middle of the seventeenth century the Privy Council was deprived of many of its actual powers. In the reign of Charles II it began to split into committees for various purposes. One of these committees developed into the Cabinet—the actual advisers of the King. As the Cabinet grew in importance the power of the Privy Council waned, until finally it became a formal body. Its functions are carried on by various "committees"—such as the Cabinet, the Judicial Committee, and the committees on education and trade. The Council only meets to pass Orders-in-Council or to issue Proclamations, a mere formality in view of the fact that three members constitute a quorum and that the Proclamations and Orders-in-Council are dictated by the Cabinet,,[1] all members of which are Privy Councillors.

During the reign of William IV a new committee, the Judicial Committee, was established by statute. For more than a century appeals had been taken from Colonial Courts to the Privy Council. Then in 1884 the Parliament of the United Kingdom passed the Judicial Act giving the right to admit appeals from any Court in the Dominions to

[1] For discussions of the Privy Council of the United Kingdom see A. Lawrence Lowell, "The Government of England," particularly Vol. I, p. 79.

the Judicial Committee of the Privy Council. The Judicial Committee legally consists of, the Lord President, the Lord High Chancellor, all Privy Councillors who hold or have held any of the offices of Lord of Appeal in Ordinary, Lord Chief Justice of England, Master of the Rolls, Lord Justice of the Court of Appeal, Judge of the late Courts of Queen's Bench, Common Pleas, Exchequer, Probate, or Admiralty, or of Chief Judge in Bankruptcy, all former Presidents of the Council, and Lord Chancellors, together with any two Privy Councillors whom the Crown may appoint from time to time, and any Privy Councillors who hold or have held High Judicial Offices, such as a Judge of the superior courts in Great Britain and Ireland and a Lord of Appeal in Ordinary. According to an Act of 1871 the Crown may appoint four paid members who had either been Judges of a Superior Court at Westminster or Chief Justices of the High Courts of India. Acts of 1895 and 1908 provide that not more than five Dominion Judges may be members of the Judicial Committee of the Privy Council.

As nominally constituted the Judicial Committee consists of seven members — the Lord Chancellor, four Lords of Appeal and two men appointed under powers given in the Act of 1833 — together with any Dominion Judge under the Act of 1895 who may at intervals be able to attend.[1]

Appeals from Canada may reach the Judicial Committee in one of two ways. In the first place, regulations, laying

[1] Keith, "R. G. in D." p. 1374.

down conditions upon which permission to appeal will be granted, are drawn up either by Order-in-Council or by Provincial Statute. These conditions having been fulfilled, the Canadian Court will grant the right to appeal. In the second place, any defeated suitor may ask the Judicial Committee of the Privy Council for leave to appeal to it from the decision of the Canadian Court. No appeal lies as of right from the Supreme Court of Canada to the Privy Council.[1] That is, there are no regulations saying that under certain conditions a suitor has the right to appeal from the Canadian Supreme Court to the Judicial Committee of the Privy Council. All appeals from the former body to the latter may only be made after the Judicial Committee has given the suitor special leave to make the appeal. This is done only in very special cases.

In 1888 the Canadian Parliament passed an Act extinguishing all right of appeal in criminal cases, to the Judicial Committee of the Privy Council. This provision was also included in the Revised Statutes of 1906. Thus the right of appeal to the Privy Council is granted only in civil cases, or in cases arising out of an interpretation of the British North America Act. Professor Keith argues that the Canadian Acts of 1888 and 1906 are *ultra vires,* and that the Judicial Committee still has the privilege to hear criminal cases. However the fact remains that that

[1] Lefroy, p. 263.

Committee has respected the Canadian Statute and has declined to hear criminal cases.[1]

As Canada obtained more and more independence this question of appeal to a body outside of Canada became very acute. In 1920 the Ontario Government proposed to secure the abolition of appeals from that Province, but they temporarily dropped the matter. In November 1920 the question was discussed in the annual meeting of the Associated Boards of Trade and Chambers of Commerce of Ontario. That body resolved as follows:[2] "Therefore be it resolved, that the Ontario Associated Boards of Trade and Chambers of Commerce are emphatically opposed to the proposal that the appeal, so far as Canadians are concerned, to the Judicial Committee of the Privy Council be abolished." Among the reasons given were: "To do away with the right of appeal to the Privy Council would deprive the people of Canada of the liberty of appealing to the highest court and the most brilliant minds in the whole world of jurisprudence, a court that was always absolutely impartial, unbiased and unprejudiced in its judgments," and, that the ordinary citizen had an incalculable advantage in the right of appeal to the Judicial Committee of the Privy Council from any Canadian Court decision that he might consider unfair or unjust. In view of the extremely high cost of carrying an appeal to the Privy Council the advantage to the "people of Canada" and to "the ordinary citizen" is not very apparent.

Mr. Raney, Attorney-General for the Province of Ontario,

[1] cf. Keith, "War Government," p. 285.
[2] "Toronto Globe," Nov. 27, 1920.

is strenuously opposed to the retention of the right of appeal to the Judicial Committee of the Privy Council. Speaking to the Toronto Board of Trade on January 11, 1921, Mr. Rancy advocated the abolition of this appeal.[1] He said: "I deny, for Canada's purposes, there are better lawyers anywhere in the world. I deny, for Canada's purposes, there are better judges anywhere, and, so far as local preposessions are concerned, when you go to London you exchange one prepossession for another, and I prefer the local prepossessions, to those over there." He proceeded to quote from the Board's resolution advocating retention of the right of appeal to the Privy Council, in which that right was referred to as "the time-honored and inalienable right of His Majesty's subjects to take their disputes to the foot of the Throne." On this statement he commented as follows: "Would you believe it, there is no such right in England, Ireland or Scotland? They have appeals to the courts, as we have them. Every court is the foot of the Throne. Every court is his Majesty's court. What is called 'the appeal to the foot of the Throne' is simply a myth, a fiction, a superstition, a fetish, like the superstition of the 'King's Evil.' From the days of Edward the Confessor to Queen Anne, hundreds of thousands of people believed that if they were affected with scrofula it was only necessary for them to touch the King and they would be cured. The King knows nothing of an appeal from Toronto; he does not hear it; he is not a lawyer. The Judges who hear appeals in England are of the same calibre as those who hear appeals in Ontario, with this difference—in Ontario the Judges are appointed by the people of Canada, by the Government of Canada, which is responsible to the people. Therefore they are our Judges. The Judges of the Privy Council are appointed by the Government of Lloyd George or Mr.

[1] "Toronto Globe," January 12, 1921.

Asquith. Which do you prefer—Judges appointed by citizens at Ottawa, or Judges appointed by the citizens of Liverpool or Manchester? It all comes right back to that." He claimed, further, that "the appeal to the Judicial Committee of the Privy Council is far from being a link of Empire, it is an irritant of the bond of Empire."

Professor Keith, in his "War Government in the Dominions" writes that "some of the arguments adduced in favour of the continuance of the appeal are hardly of serious weight; the impression that there is something of special value in the idea of a suppliant having the right to ask the King to do him justice, which has been refused in the Courts of the Dominion, has really very little applicability to a procedure which enables wealthy corporations to inflict grave difficulties on poorer litigants, and which is practically not effectively available to a poor litigant. Nor is there much more force in the argument that the Judicial Committee tends to secure a uniformity of law, for so many inroads have been made in the Dominions into the common law that this function is of no great importance, and in Quebec and the Union of South Africa English law is not the common law." The arguments which Mr. Keith gives for the retention of the appeal, namely that "the Court serves to maintain the true doctrine of the royal prerogative, a subject especially difficult for Dominion Courts to deal with, and that its over-ruling authority preserves the supremacy of Imperial over Dominion legislation, where the two conflict," are arguments which, in Canada, would be used against a retention of the appeal. The only possible argument in favor of appeal to the Judicial Committee of the Privy Council is that that right is a tie binding Canada to the United Kingdom, and even its value as such a tie is questioned by many.

The powers of the Judicial Committee of the Privy Council

have been greatly curtailed. Serious opposition to the privilege of appeal to that body has arisen, and there is a very great possibility that that privilege will be done away with as far as Canada is concerned. Nevertheless at present it stands as a bond connecting Canada with the United Kingdom.

32. Communications

Communications[1] between the Government of Canada and that of the United Kingdom ordinarily pass through the Governor-General and the Colonial Office. That is the form that has come down from the colonial days. While in form the communications are from the Governor-General to the Secretary of State for the Colonies, they really are from the Government of Canada to the Government of the United Kingdom. The former Government merely sends them in the name of its nominal head to a Cabinet Minister of the latter Government. In spite of the fact that the procedure is a mere form there has been an agitation to do away with it and to have direct communication between the Governments. Such a proposal was made at the Imperial Conference of 1911, but was not adopted. In 1918 the question was raised by Canada, and the Government of the United Kingdom immediately conceded the right of the Canadian Government to communicate directly with the Government of the United Kingdom — that is, the Prime Minister of Canada could deal directly with the Prime Minister of the

[1] Borden, p. 107-108.

United Kingdom without going through the formality of transmitting his messages through the Governor-General and the Colonial Secretary. Direct communications are to be limited to matters of Cabinet concern, the Dominion Prime Minister to judge whether the question is of that importance or not. This right was conceded in accordance with the general recognition of the fact that all the Governments within the Empire are virtually on a footing of equality.

That the Canadian Government has evidently found the old method just as satisfactory is shown by the fact that such an important discussion as the one concerning the necessity of the ratification of the Treaty of Versailles[1] by the Canadian Parliament was carried on through the old channels—through the Governor-General and the Colonial Secretary. Even though important messages continue to be sent according to the old form, the right of direct communication between the two Governments has been established.

33. High Commissioner

In 1879 when Sir Alexander Galt was chosen to occupy the position of Canadian representative in Great Britain, he was nominated as "minister resident." After consultation with the Imperial Government the title of High Commis-

[1] See infra., p. 112.

sioner was selected as satisfactory and suitable.[1] The intention of the Dominion Government in nominating Sir Alexander Galt as "minister resident" could only have been that he should be received and recognized as Canada's representative, and thus be given an official standing as such. This claim, that the High Commissioner was the representative of a Dominion, and therefore entitled to a position in the official hierarchy was gradually acknowledged. It was fully conceded by the recognition accorded the High Commissioner by order of the present king at the royal funeral in 1910, at the state opening of the Parliament, and at the Coronation of 1911.[2]

The High Commissioner is Canada's representative in the United Kingdom, and as such he has important duties. Upon the appointment of Mr. P. C. Larkin these duties were increased by the Liberal Government of the Hon. W. L. Mackenzie King.[3] The High Commissioner has been made responsible for all Canadian Governmental affairs in Great Britain. He will have jurisdiction over immigration, Trade Commissions, Boards of Pensions, Soldiers Civil Re-establishment and all other Canadian departments; he will be directly responsible to the Canadian Government. The High Commissioner occupies an important position as a link in the connection between Canada and Great Britain.

[1] For the correspondence between the Governments, see Keith, "Selected Documents," p. 143-155.

[2] Keith, "Responsible Government in the Dominions," p. 341.

It is reported that a new precedent is to be established in that the recently appointed Canadian High Commissioner is to be received by the King.

[3] "Toronto Globe," February 10, 1922.

It is he who represents Canada; he encourages trade and immigration; he watches over Canadian interests in Great Britain; and finally, he is in a position where, through his actions and utterances, he will be able to affect materially the good-will between the two countries.

CHAPTER IV

RELATIONS WITH OTHER COUNTRIES

The evolutionary development of Canada as a political entity was accelerated by the Great War. Change followed change with a rapidity that was perplexing. The status of Canada and its relation to Great Britain, complicated and misunderstood as it was, became much more so through the entrance of Canada into the international field. Then bewilderment gave way to confusion. An event that contributed to this as much as any other was the fact that Canadian plenipotentiaries signed the Treaty of Versailles. The right to appoint a Minister Plenipotentiary at Washington, participation in various conferences, membership in the League of Nations, all added to the confusion. These various facts will be considered in this chapter.

34. Treaties and Agreements

The first step Canada took in the general direction of treaty negotiation was in connection with trade agreements.[1]

[1] For a valuable history, see Sir Robert Borden's Address to the Canadian House of Commons, Hansard, LVI. No. 45; Keith, "Responsible Government in the Dominions," pp. 1101-1130.

As early as 1870 a resolution was moved in the Canadian House of Commons to the effect that it would be expedient to obtain from the Imperial Government all necessary powers to enable the Canadian Government to negotiate commercial treaties. This resolution met with the strong approval of Sir Alexander Galt, but it was opposed and defeated by the Government of Sir John A. Macdonald. In 1874 Mr. George Brown and the British Ambassador at Washington negotiated a commercial treaty with the United States,—a treaty which the United States Senate failed to ratify. Later, in 1878, Sir Alexander Galt was associated with the British Ambassador in conducting trade negotiations with Spain and France. In 1882 Mr. Edward Blake moved a resolution, in the Canadian House of Commons, which contained the following clause: "That it is expedient to obtain all necessary powers to enable Her Majesty, through her representative, the Governor General of Canada, acting by and with the advice of the Queen's Privy Council of Canada, to enter by an agent or representative of Canada, into direct communication with any British possession or Foreign State, for the purpose of negotiating commercial arrangements, tending to the advantage of Canada, subject to the prior consent, or to the subsequent approval of the Parliament of Canada signified by Act." This resolution, also, was defeated by the Government of Sir John A. Macdonald. A few years later it was desired to enter into commercial negotiations with Spain. Commenting upon that desire the Foreign Office, in 1884, wrote to the Canadian High Commissioner: "If the Spanish Government are favourably disposed the full power for these negotiations will be given to Sir Robert Morier and Sir Charles Tupper jointly. The actual negotiations would probably be conducted by Sir Charles Tupper, but the Convention, if concluded, must be signed by both plenipotentiaries."

During the next ten years several resolutions, asking that Canada be conceded the right to negotiate commercial treaties, were introduced in the Canadian House of Commons, but they were defeated. In 1893 Sir Charles Tupper negotiated a commercial treaty with France; he signed that treaty along with the British Ambassador. The increased activity of Canada in negotiating or attempting to negotiate commercial treaties became the subject of a despatch from the Marquis of Ripon to the Governor-General of Canada on June 28, 1895. This despatch, after noting that commercial treaties affecting the Colonies had been negotiated by the Colonies, continued to lay down the following rule of procedure: "A foreign Power can only be approached through her Majesty's Representative, and any agreement entered into with it, affecting any part of her Majesty's dominions, is an agreement between her Majesty and the Sovereign of the foreign State, and it is to her Majesty's Government that the foreign State would apply in case of any question arising under it.

"To give the Colonies the power of negotiating treaties for themselves without reference to her Majesty's Government would be to give them an international status as separate and sovereign States, and would be equivalent to breaking up the Empire into a number of independent States, a result which her Majesty's Government are satisfied would be injurious equally to the Colonies and to the Mother Country, and would be desired by neither.

"The negotiation, then, being between her Majesty and the Sovereign of the foreign State, must be conducted by her Majesty's Representative at the Court of the foreign Power, who would keep her Majesty's Government informed of the progress of the discussion, and seek instructions from them as necessity arose.

[1] Keith, "Selected Documents," pp. 156-164.

"It could hardly be expeeted, however, that he would be suffieiently eognisant of the circumstanees and wishes of the Colony to enable him to eonduet the negotiation satisfactorily alone, and it would be desirable generally, therefore, that he should have the assistanee, either as a seeond Plenipotentiary or in a subordinate eapacity, as her Majesty's Government think the eireumstanees require, of a delegate appointed by the Colonial Government.

"If, as a result of the negotiations, any arrangement is arrived at, it must be approved by her Majesty's Government and by the eolonial Government, and also by the Colonial Legislature if it involves legislative aetion, before the ratifieations can be exchanged."

In 1907 Mr. W. S. Feilding and Mr. L. P. Brodeur negotiated a eommereial eonvention between Canada and Franee.[1] Previous to the negotiations the British Seeretary of State for Foreign Affairs, Sir Edward Grey, addressed a despateh to the Charge d'Affairs at Paris in whieh he stated that the regulations laid down in the Marquis of Ripon's despateh would not have to be adhered to strictly.[2] Indeed, as Sir Robert Borden pointed out,

[1] For the form of the Convention, see Hansard, LVI. No. 40, p. 2216.

[2] "In my telegram of the 23rd of May I informed you that Sir W. Laurier desired to open negotiations for new commercial conventions with the French Government, and I requested that you would endeavor to assist him in the attainment of his object. You are doubtless cognisant of the Marquis of Ripon's despatch of June 28th, 1895, to the Governors of the principal British Colonies, in which it was laid down that commercial negotiations of this nature, being between his Majesty and the Sovereign of the foreign State, should be conducted by his Majesty's Representative at the Court of the foreign Power. A copy of this despatch is enclosed herewith.

"I do not, however, think it necessary to adhere in the present case to the strict letter of this regulation, the object of which was to secure that negotiations should not be entered into and carried through by a Colony unknown to and independently of his Majesty's Government.

subsequent events showed that the particular feature of Lord Ripon's despatch of 1895 has been honored more in the breach than in the observance.[1]

In 1921 a new Trade Agreement was negotiated with France. Negotiations on behalf of Canada were conducted by Sir George Foster.[2] He was authorized to act and to sign by the Government of Canada.[3] That authority was intimated to the Foreign Office, and that Office sent a despatch to the British Ambassador in Paris instructing him to sign on behalf of His Majesty's Government. The Agreement was signed by Hardinge of Penhurst and Sir George Foster. It was approved by the Canadian House of Commons on April 14, 1921.

Canada did not limit herself to participation in trade agreements. In 1871 Sir John A. Macdonald participated in the negotiations of the Treaty of Washington. In 1888 Sir Charles Tupper was associated with the British representative in negotiating a Fisheries Treaty with the United States of America. This treaty was not ratified. Then in 1898 a Joint High Commission, consiting of three Canadians

"The selection of the negotiator is principally a matter of convenience, and, in the present circumstances, it will obviously be more practical that the negotiations should be left to Sir W. Laurier and to the Canadian Minister of Finance, who will doubtless keep you informed of their progress.

"If the negotiations are brought to a conclusion at Paris, you should sign the Agreement jointly with the Canadian negotiator, who would be given full powers for the purpose."

[1] Hansard, LVI. No. 45, p. 2472.

[2] Hansard, LVI. No. 40, p. 2206, Sir George Foster: "The agreement was made between myself and the French Authorities, and the text, which was in French, was signed by both parties."

[3] Hansard, LVI. No. 45, p. 2215.

—Sir Wilfrid Laurier, Sir Richard Cartwright, and Sir Louis Davies—and one Englishman—Lord Herschell, was appointed to negotiate with the United States concerning matters still outstanding between that country and the British Empire. In 1903 a convention creating an International Seismological Association was signed at Strasbourg. Canada was a party to that Convention. Oppenheim includes Canada in a list of states which were a party to the agreement.[1] In 1908 the Prime Minister, Sir Wilfrid Laurier, asked the present Prime Minister, Mr. W. L. Mackenzie King, to ascertain from the Foreign Office of Great Britain what view Great Britain would take as regards a treaty on the subject of immigration being made with the Chinese Government. The then Secretary Sir Edward Grey, at present Lord Grey, took the position at the time that a minister of the Crown in Canada had as much right to act in the name of the Sovereign as any minister of the Crown in Great Britain, and that a minister of the Crown in Canada might receive from the King in England the same authority to act in the negotiating and the signing of a treaty as could be given any British minister.[2]

In 1908-1909 a treaty to regulate the use of the waterways adjacent to the international boundary between Canada and the United States was arranged. A Canadian, Sir George Gibbons, participated in the negotiations of this treaty, and according to the Speech from the Throne in 1909, "the advice of the Dominion Government was sought and fol-

[1] Oppenheim, "International Law," p. 771.

[2] Hansard, LVI. No. 45, p. 2494.

lowed.'' The agreement in 1909 to refer the North Atlantic Fisheries question to the Hague Court was arranged by Canadians on behalf of Canada, as was the Behring Sea International Convention of 1911. In 1912, at the Radiotelegraphic Conference, the further step was taken of empowering the Dominion delegates to negotiate and sign for the King in respect of each Dominion.[1] This procedure was adhered to in the Convention for the Safety of Life at Sea, 1914.

Canada having negotiated various treaties and agreements, it was but natural for her to demand a share in the settlement that was to follow the Great War. During the latter part of the war this demand was very persistent; it came to a head with the cessation of hostilities. On October 27, 1918, Premier Lloyd George cabled to the Canadian Prime Minister, Sir Robert Borden, that the end of the war was in sight and that it was very important for him to come to Europe without delay in order to participate in the ensuing deliberations.[2] On October 29, Premier Borden replied: ''There is need of serious consideration as to representation of the Dominions in the peace negotiations. The press and people of this country take it for granted that Canada will be represented at the Peace Conference. I appreciate possible difficulties as to representation of the Dominions, but I hope you will keep in mind that certainly a very unfortunate impression would be created and possibly dangerous feeling might be aroused if these difficulties are not overcome by some solution which will meet the national spirit of the Canadian people. We discussed the subject

[1] Keith, ''War Government,'' p. 147-148.

[2] For Correspondence, Documents, etc., relating to the Peace Treaty, see Sessional Paper, Canada, 41 J, of 1919.

today in Council and I found among my colleagues a striking insistence which doubtless is indicative of the general opinion entertained in this country. In a word, they feel that new conditions must be met by new precedents. I should be glad to have your views."[1] Five days later Premier Lloyd George replied that the questions raised by Premier Borden made it all the more important that he hasten to Europe. Within a week the Canadian Prime Minister left for London.

On December 4, the Acting Prime Minister of Canada cabled to Sir Robert Borden: "Council today further considered Candian representation at Peace Conference and is even more strongly of opinion than when you left, that Canada should be represented." The cablegram went on to suggest that representation should be to some extent commensurate with war efforts. On January 2, 1919, Premier Borden cabled the Acting Prime Minister that he had taken up the question of Canada's representation in Council and that he had spoken very frankly and firmly as to Canada's attitude, The solution he proposed was that Canada should have the same representation as Belgium, and further that some of the British Empire representatives should be drawn from a panel on which each Dominion Prime Minister should have a place. On January 4 the Acting Prime Minister replied: "If Peace Conference in its composition is to express spirit of democracy for which we have been fighting, as Council thinks it should, small allied nations like Belgium which have fought with us throughout the war should be entitled to representation throughout whole Conference, even if limited to one member, and if this were agreed, proposal that Canada should have same representation as Belgium and other small allied nations would be satisfactory, but

[1] This is illustrative of the new method of direct correspondence between the two Prime Ministers.

not otherwise. Canada has had as many casualties as the United States and probably more actual deaths. Canadian people would not appreciate five American delegates throughout the whole Conference and no Canadian entitled to sit throughout Conference, nor would they appreciate several representatives from Great Britain and Canada none. There will be great disappointment here if you are not full member of Conference. We fully appreciate that you are doing everything in your power to secure suitable representation for Canada."

As a result of Sir Robert Borden's efforts Canada's right to representation was recognized. In the "Rules of Conference," January 18, 1919, it was provided that Canada should be entitled to two representatives who should attend sessions at which questions concerning Canada were to be discussed. Section II provided that "The representatives of the Dominions (including Newfoundland), and of India can, moreover be included in the representation of the British Empire by means of the panel system."

Representation at the Peace Conference, having been accorded, the next step was to obtain the right to be a party to any resulting treaty or convention. Accordingly on March 12, Sir Robert Borden, on behalf of the Dominion Prime Ministers circulated the following memorandum:

"(1) The Dominion Prime Ministers, after careful consideration, have reached the conclusion that all the treaties and conventions resulting from the Peace Conference should be so drafted as to enable the Dominions to become Parties and Signatories thereto. This procedure will give suitable recognition to the part played at the Peace Table by the British Commonwealth as a whole and will at the same time record the status attained there by the Dominions.

"(2) The procedure is in consonance with the principles of constitutional government that obtain throughout the

Empire. The crown is the supreme executive in the United Kingdom and in all the Dominions, but it acts on the advice of different Ministers within different constitutional units; and under Resolution IX[1] of the Imperial War Conference, 1917, the organization of the Empire is to be based upon equality of nationhood.

"(3) Having regard to the high objects of the Peace Conference, it is also desirable that the settlements reached should be presented at once to the world in the character of universally accepted agreements, so far as this is consistent with the constitution of each State represented. This object would not be achieved if the practice heretofore followed of merely inserting in the body of the convention an express reservation providing for the adhesion of the Dominions were adopted in those treaties; and the Dominions would not wish to give even the appearance of weakening this character of the peace.

"(4) On the constitutional point, it is assumed that each treaty or convention will include clauses providing for ratification similar to those in the Hague Convention of 1907. Such clauses will, under the procedure proposed, have the effect of reserving to the Dominion Governments and legislatures the same power of review as is provided in the case of other contracting parties.

"(5) It is conceived that this proposal can be carried out with but slight alterations of previous treaty forms, thus:

(a) The usual recital of Heads of State in the Preamble needs no alteration whatever, since the Dominions are adequately included in the present formal description of the King, namely, 'His Majesty the King of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas, Emperor of India.'

(b) The recital in the Preamble of the names of the Plenipotentiaries appointed by the High Contracting Parties for the purpose of concluding the treaty would include the names of the Dominion Plenipotentiaries immediately after the names of the Plenipotentiaries appointed by the United

[1] Supra, p. 77.

Kingdom. Under the general heading "The British Empire" the sub-headings, "the United Kingdom," "The Dominion of Canada," "The Commonwealth of Australia," the "Union of South Africa," etc., would be used as headings to distinguish various plenipotentiaries.

(c) It would then follow that the Dominion Plenipotentiary would sign according to the same scheme.

"(6) The Dominion Prime Ministers consider, therefore, that it should be made an instruction to the British member of the Drafting Commission of the Peace Conference that all treaties should be drawn according to the above proposal."

The form finally employed diverged from the above, in that the names of the plenipotentiaries signing on behalf of the United Kingdom were not preceded by the sub-heading, "for the United Kingdom." Their names followed immediately after that of the King. The form used was:

"His Majesty the King of the United Kingdom of Great Britain and Ireland and of the British Dominions Beyond the Seas, Emperor of India, by:

The Right Honourable David Lloyd George, M.P., etc.
The Right Honourable Andrew Bonar Law, M. P., etc.
The Right Honourable Viscount Milner, G. C. B., etc.
The Right Honourable Arthur James Balfour, O.M., etc.
The Right Honourable George Nicoll Barnes, M. P., etc.
And

for the Dominion of Canada, by:

The Honourable Charles Joseph Doherty, Minister of Justice;
The Honourable Arthur Lewis Sifton, Minister of Customs";

for the Commonwealth of Australia, ...etc.

The next move on the part of the Dominion was to take

action to have it appear as a matter of record that the men signing on behalf of Canada derived their power and authority from Canada in form as well as in fact. On April 10,1919, the Canadian Cabinet passed the following Order-in-Council authorizing the issuance of full powers to the Canadian Plenipotentiary Delegates: "His Excellency the Governor-General in Council, on a report from the Acting Secretary of State for External Affairs, stating that it is expedient, in connection with the Peace Congress, to invest fit persons with full powers to treat on the part of His Majesty the King in respect of the Dominion of Canada with persons similarly empowered on the part of other States, is pleased to order and doth hereby order that His Majesty the King be humbly moved to issue letters patent to each of the following named persons" — then the Canadian Plenipotentiaries are named, Sir Robert Borden, Sir George Foster, Mr. A. L. Sifton,, Mr. C. J. Doherty, — "naming and appointing him as Commissioner and Plenipotentiary in respect of the Dominion of Canada, with full power and authority as from the first day of January, 1919, to conclude with such plenipotentiaries as may be vested with similar power and authority on the part of any powers or states, any treatics, conventions or agreements in connection with the said Peace Congress, and to sign for and in the name of His Majesty the King in respect of the Dominion of Canada everything so agreed upon and concluded and to transact all such other matters as may appertain thereto."

On April 16 Sir Robert Borden sent a copy of this Order-in-Council to Premier Lloyd George and said that "some appropriate step should be taken to link it up with the Full Powers issued by the King to the Canadian Plenipotentiaries and with the papers connected therewith, in order that it may formally appear in the records that their Full Powers were issued on the repsonsibility of the Canadian Govern-

ment.'' Full Powers, dated as of January 1, 1919, were then issued by His Majesty to each of the Dominion Plenipotentiaries, giving them power to negotiate, adjust, and conclude any treatics, conventions or agreements with duly appointed plenipotentiaries of other powers or state. Further, they were empowered to sign for him in respect of the Dominion of Canada. In accordance with the authority derived from the Canadian Order-in-Council and the Full Powers issued by His Majesty, two Canadian Plenipontentiaries, Mr. C. J. Doherty and Mr. A. L. Sifton, signed the Treaty of Versailles, June 28, 1919, in the name of his Majesty on behalf of the Dominion of Canada.

The struggle was not over. Canada had won admission to the Peace Conference, she had obtained the right to sign the treaties, and she had caused it to appear as a matter of record that the Canadian Plenipotentiaries signing the treaties had derived their authority from the Government of Canada. One more step remained. The treaty must be ratified by the Parliament of Canada. On July 4, 1919 Lord Milner, Secretary of State for the Colonies, cabled to the Canadian Governor-General as follows: ''It is hoped German treaty may be ratified by three of the Principal Allied and Associated Powers and by Germany before end of July.'' To which the Governor-General replied on July 9:[1] ''Following from Prime Minister. Your message of July 4 respecting ratification of the Peace Treaty with Germany. I'' (that is, the Prime Minister) ''am under pledge to sub-

[1] This cablegram is illustrative of how the Canadian Government carried on an important discussion through the old channels of the Governor-General and the Colonial office. In effect the correspondence was between the Government of Canada and the Government of the United Kingdom.

mit the Treaty to Parliament before ratification on behalf of Canada. No copy of Treaty has yet arrived and Parliament has been prorogued. Kindly advise how you expect to accomplish ratification on behalf whole Empire before end July." On July 23 the Colonial Secretary cabled that he had consulted with the Prime Minister and the Cabinet and that their view was that early ratification was of the highest importance. The King, they stated, had the constitutional right to ratify a treaty on the advice of his constitutional advisers—the Ministries of the Dominions and of the United Kingdom. As members of all those ministries had signed the treaty that action could be taken as implying the consent of the ministries and therefore His Majesty could ratify without further necessary action on the part of the various ministries. However, should the Canadian Ministry deem it necessary for them to submit the treaty to Parliament, the Government of the United Kingdom were willing to delay ratification, but in their opinion "it would be impossible without the gravest consequences to delay ratification until the late autumn." The Canadian Government replied that they doubted whether, under modern constitutional practice, the King should ratify without first obtaining the approval of Parliament. Further, they could not understand the suggestion that the signatures of the Canadian Plenipotentiaries were equivalent to tendering of advice to ratify. They suggested summoning Parliament at the earliest possible date and having that body ratify the treaty. Three days later, having received no answer to this communication, the Canadian Government cabled for an immediate reply. On August 2, the Government of the United Kingdom replied, advising that Parliament be summoned,

but warning that they might be unable to delay ratification until after the Canadian Parliament had approved the treaty. To this message the Canadian Prime Minister on August 4, 1919, sent the following significant reply: "Your message reached me yesterday afternoon and this morning Parliament has been summoned for Monday, September 1st. I cannot emphasize too strongly the unfortunate results which would certainly ensue from ratification before Canadian Parliament has had an opportunity of considering the treaty." The Canadian Parliament assembled on September 1, 1919. On September 2, Sir Robert Borden introduced the following resolution: "Resolved, that it is expedient that Parliament do approve of the Treaty of Peace between the Allied and Associated Powers and Germany (and the Protocol annexed thereto), which was signed at Versailles on the twenty-eighth day of June, nineteen hundred and nineteen, a copy of which has been laid before Parliament, and which was signed on behalf of his Majesty, acting for Canada, by the plenipotentiaries therein named, and that this house do approve of the same." A very interesting debate ensued. During the course of the debate Mr. W. S. Fielding inquired of Sir Robert Borden: "What will be the consequences of refusal or failure on the part of the Parliament of Canada to ratify the Treaty? In what manner, and in what degree would the interests of Canada, of the Empire, and the world be affected?"[1] Sir Robert Borden replied: "Canada would stand out of and apart from the rest of the Empire ratifying the Treaty. It would virtually, I think, commit Canada to such absolutely independent action, that she could not be regarded in the future as acting in co-operation with the other nations of the Empire."

[1] Revised Hansard, Vol. 139, p. 22.

On September 11, 1919, Premier Borden's motion was approved and on September 12, the following Order-in-Council was passed:

"WHEREAS, at Versailles on the 28th day of June, nineteen hundred and nineteen, a Treaty of Peace (including a protocol annexed thereto between the Allied and Associated Powers and Germany) was concluded and signed on behalf of His Majesty, for and in respect of the Dominion of Canada, by plenipotentiaries duly authorized for that purpose by His Majesty on the advice and recommendation of the Government of the Dominion of Canada.

AND WHEREAS the Senate and House of Commons of the Dominion of Canada have by resolution of the said Treaty of Peace;

AND WHEREAS it is expedient that the said Treaty of Peace be ratified by His Majesty for and in respect of the Dominion of Canada;

Now, therefore, the Governor-General in Council, on the recommendation of the Secretary of State for External Affairs, is pleased to order and doth hereby order that His Majesty the King be humbly moved to approve, accept, confirm and ratify the said Treaty of Peace, for and in respect of the Dominion of Canada."

The struggle was ended. Canada's right to negotiate, sign and approve political treaties applicable to her had been established. Subsequently Canada approved the Austrian Treaty, the Czecho-Slovak Minorities Treaty, the Serb-Croat-Slovent Minorities Treaty, and the Bulgarian Treaty.

During the session of 1921 the Canadian Parliament ratified the protocol establishing the Permanent Court of Interna-

tional Justice.[1] This protocol was the result of the labors of ten eminent jurists, who conferred at the Hague from June 16 to July 24, 1920. The protocol was then submitted to the Council and Assembly of the League of Nations. In an amended form it was unanimously assented to by the Assembly after which it was signed by the various members. In connection with the signing of this protocol the procedure suggested in the case of the Versailles Treaty by Premier Borden was followed. There were no signatures on behalf of the Empire as a whole.[2] It was signed on behalf of Great Britain by Mr. A. J. Balfour, and on behalf of Canada by the High Commissioner at Paris under authorization of a Canadian Order-in-Council. It was subsequently approved by the Canadian Parliament and the King on the advice of his ministers ratified it on behalf of the Empire. On April 28, 1921, the Minister of Justice, Mr. Doherty, expressed the opinion in the Canadian House of Commons that Canada may be a party to an international question and he stated that in regard to a treaty made by Canada, his Majesty is advised by his Canadian Ministers irrespective of the British Ministry.[3]

On August 11, 1921, the President of the United States of America sent a formal invitation to the Government of Great Britain to send representatives to a Conference to be held in the City of Washington on November 11, 1921, on the subject of Limitation of Armaments. This invitation was accepted by His Majesty's Government on August 22,

[1] Hansard, Vol. LVI. Nos. 50 and 55.

[2] Hansard, LVI. No. 50, p. 2822.

[3] Hansard, LVI. No. 50, p. 2813.

1921. Objection was raised in the Dominions because they had not been invited, it being contended that the American State Department had "slammed the door" in the face of the Dominions. This elicited a statement from the State Department to the effect that the personnel of the British delegation was a matter of British concern, and that they did not desire to appear to dictate in the matter.

On May 1, 1922, correspondence relating to Dominion representation at the Washington Conference was tabled in the Canadian House of Commons. From this correspondence it appears that the Canadian Government at first acquiesced in the arrangement agreed upon at the Imperial Conference, that the delegation appointed by the Government of Great Britain should represent the whole Empire. On October 3, Premier Lloyd George cabled the Canadian Premier, Mr. Meighen, that he was "most anxious for standpoint of Canada to be well represented on British Empire delegation" at the Washington Conference. Premier Meighen "nominated" Sir Robert Borden, presumably for appointment by the Government of Great Britain.

On October 19 the Premier of South Africa, General Jan C. Smuts, cabled from Pretoria to Premier Meighen as follows: "I notice from the Press that you are sending representative to the Washington Conference. I do not know whether you have received an invitation from the United States through the British Government or otherwise. Would very strongly urge that you should press for such invitation before sending delegate. The United States did not ratify the Peace Treaty to which we are signatories as component independent States of the British Empire. The agitation in the Congress against our independent voting power in the League of Nations was a direct challenge to the new Dominion status. This is the first great international con-

ference after Paris, and if the Dominions concerned are not invited and yet attend, a bad precedent will be set and the Dominion status will suffer. If a stand is made now and America acquiesces, our equal status is finally won." Premier Smuts sent the same appeal to Premier Lloyd George. As a result, on October 21, Mr. Lloyd George cabled Mr. Meighen that he was completely in accord with Premier Smuts' view that the Dominion representatives should hold the same status as at Paris. The message continued: "Foreign Office proposes, with your approval, to submit to the King full power for each Dominion representative to sign only on behalf of his respective Dominon in accordance with precedence established at Paris. Under this procedure signature of each Dominion delegate will be necessary, in addition to signatures of British delegates, to commit British Empire delegation as a whole to any agreement made at the conference, and any Dominion delegate can, if he wishes, reserve assent on behalf of his Government."

Premier Meighen replied that "we agree to proposed procedure. In accordance therewith minute of Council will be passed and transmitted as basis for issuance of full powers to representative of Canada. Essential that Dominion representative should hold same status as at Paris, and that this status must not be allowed to be prejudiced by proceedings at Washington Conference." The minute of the Canadian Privy Council was dated October 22, 1921, and it stated that it had been arranged that one representative of Canada should be appointed as a member of the delegation which was to represent the British Empire at the Washington Conference for the Limitation of Armaments. Accordingly Canada was represented by a Plenipotentiary appointed by the King upon the advice and authority of a Canadian Order-in-Council. The Canadian representative, Sir Robert Borden, participated in the various sessions and

he signed the various treaties in the name of his Majesty on behalf of the Dominion of Canada.[1]

All the treaties concluded at Washington, to which the British Empire is a party, were signed on behalf of Canada by the Canadian representative. The form used was the same as that employed at Versailles.[2] On March 8, 1922, these were placed before the Canadian House of Commons for consideration.[3] They will have to be approved by the Parliament of Canada before the King may ratify them on behalf of Canada.

Canada's participation in the negotiation of political

[1] U. S. Senate Document 124.

[2] e. g. the preamble to the Agreement Limiting Naval Armaments contains the following:—

His Majesty, the King of the United Kingdom, of Great Britain and Ireland and of the British Dominions beyond the Seas, Emperor of India:

The Right Honourable Arthur James Balfour, etc.

The Right Honourable Baron Lee of Fareham, etc.

The Right Honourable Sir Auckland Campbell Geddes, etc.

and

for the Dominion of Canada:

The Right Honourable Sir Robert Laird Borden, etc.

for the Commonwealth of Australia:

etc.

The other treaties which were signed on behalf of Canada were: The Treaty in relation to the use of Submarines and Noxious Gasses in Warfare; the Four Power Treaty Relating to Insular Possession and Insular Dominions in the Pacific Ocean; the Declaration accompanying the foregoing Treaty and the Supplementary Treaty signed February 6, 1922; the Treaty relating to the Principles and Policies to be followed in matters concerning China, and the Treaty relating to Chinese Customs Tariff.

[3] Hansard, LVII. No. 2.

treaties, in signing and later approving those treaties, has several significances. Two are of Imperial concern, and may be stated here. That action is a further recognition of the principle of responsible self-government, of the principle that only the Government of Canada can bind Canada, and it is a confirmation of the alteration of the constitution of the Empire. The other significances are of international concern and must properly be left until all of Canada's international activities have been discussed.

35. Diplomatic Representation

Canada, as a colony, was not entitled to send or receive diplomatic representatives. As she grew, and as her status developed, she came in contact with other countries, developing relations with them. At first these relations were conducted through the regular diplomatic channels—the diplomatic service of Great Britain. As they increased Canada found it desirable to devise some means whereby she could enter into direct communication with the Governments of other countries. To do this she utilized the means nearest at hand—the consular service.

Consular Officers are not supposed to have a diplomatic character,[1] but for a number of years the Consuls-General of the United States, of Japan, of Italy, and of Germany

[1] Moore, "Digest" Vol. V., Sections 696-733; Hall, W. E., pp. 325-333; Revised Hansard, 1920, p. 1886, Sir George Foster stated that Canadian Consuls had no diplomatic character, but that they confined themselves to matters of trade and commerce.

at Ottawa and Montreal have discharged functions of a diplomatic or semi-diplomatic character.[1] They are not entitled to diplomatic privileges, although they receive certain courtesies. This entire development, of course, was a deviation from the accepted rules of international law, but it was a necessary one.[2] In 1906 the Japanese Consul advised the Canadian Government as to the expected results of the Japanese Commercial Treaty. In 1909 negotiations were carried on with both the Italian and the German Consuls. In 1913 the Canadian Prime Minister negotiated directly with the Japanese Consul General regarding Canada's adherence to the Anglo-Japanese Treaty of 1911.[3] An agreement was arrived at, and Canada proceeded to pass the necessary legislation in order to carry out her part of the agreement. In the debate in the House of Commons the Prime Minister announced that the Japanese Consul General had agreed that Japan on her part would continue to enforce the provisions of the previous agreement with Canada, whereby emigration was restricted. Canada fulfilled her part of the agreement, whereupon the Japanese Consul General communicated Japan's promise directly to the Canadian Prime Minister, in the following terms: "The undersigned, His Imperial Japanese Majesty's Consul General at Ottawa, duly authorized by his Government, has the honour to declare that the Imperial Japanese Government are fully prepared to maintain and intend to maintain with equal effectiveness the limitation and control which they

[1] Borden, p. 128; Keith, "R. G. in D.," p. 1132.
[2] Revised Hansard, 1909-1910, pp. 853-855; 1910-1911, pp. 952-980.
[3] Borden, p. 128; Revised Hansard, 1912-1913, Vol. IV, pp. 6958-6973.

have since 1908 exercised in the regulation of emigration from Japan to Canada."[1]

While utilization of the Consular service sufficed in the case of some countries, Canada found that her relations with Great Britain and the United States demanded some other arrangement. To Great Britain she sent a High Commissioner.[2] Canada desired that her High Commissioner in Great Britain should be granted a quasi-diplomatic position.[3]

The Government of Great Britain thought otherwise, and replied: "Looking, however, to the position of Canada as an integral portion of the Empire, the relations of such a person with her Majesty's Government would not be correctly defined as being of a diplomatic character, and, while her Majesty's Government would readily accord to him a status in every way worthy of his important functions, his position would necessarily be more analogous to that of an officer in the home service, than to that of a Minister of a foreign court." They therefore suggested that the High Commissioner should communicate with the Colonial Office, and that in the event of negotioations with a foreign court it would rest with the Secretary of State for Foreign Affairs to determine in each case in what precise capacity his services might best be rendered. The Canadian Government accepted the proposals of the Goverment of the United Kingdom, but they still adhered to the belief that the High Commissioner should have a quasi-diplomatic character. As time went on the High Commissioner engaged in various acts of such a character, he discharged semi-diplomatic functions, and finally he was accorded a place in the official hierarchy.

[1] Revised Hansard, 1912-1913, Vol. IV, p. 7550.

[2] See supra, p. 117.

[3] Despatch of Sir Michael Hicks-Beach, Bart., to the Marquis of Lorne, November 1, 1879; Keith, "Documents," p. 143-150.

So far this expedient in the case of Great Britain has proven satisfactory. But special needs demanded special remedies. When treaties and conventions were to be negotiated men were vested with a quasi-diplomatic character and were authorized to act for Canada. In this way Canada participated in the negotiation of numerous agreements,[1] she engaged in diplomatic activities and sent temporary diplomatic representatives. These acts did not destroy the Empire, and hence it was argued that if it was proper for the Dominion to engage in diplomatic activities for five days in the year, it would be just as proper to do so for three hundred and sixty-five days in the year, and hence Canada should be accorded the right of appointing diplomatic representatives.

For many years the question of Canadian representation at Washington has been mooted,[2] but no definite action was taken until in the closing days of the war a Canadian War Mission was established at Washington. The Mission was created by an Order-in-Council,[3] which, after noting the development of the relations between Canada and the United States, went on to assert:

"That out of such consideration there has arisen the inevitable necessity for frequent and prompt communication and negotiation between the authorities of the Canadian and the United States Government. In view however of the extent and complexity of the war organization which has necessarily been evolved by both, such negotiations are subject to serious delay if conducted through the usual

[1] Hansard, Vol. LVI, No. 45.

[2] Hansard, Vol. LVI, No. 45.

[3] Hansard, Vol. LVI, No. 45, p. 2473.

diplomatic channel; for His Majesty's Embassy in Washington are obliged in the prevailing conditions to deal with an ever increasing multitude of important affairs not directly concerning Canada, and indeed the negotiations in question are not diplomatic in their nature, but rather are largely of a business and commercial character requiring different, more direct and prompt treatment. As a consequence the custom, which had already arisen before the war, of arranging conferences from time to time between Canadian and United States officials for specific purposes of common concern, has since been greatly developed with marked benefit.

"The Prime Minister further observes that the development in all these respects, however, has been such that some more direct, less casual, less transient arrangement for securing the object indicated should be devised." The Order in-Council then recommended that a Canadian representative at Washington be appointed, and expressed the opinion that the ends in view might be attained by the institution of a Canadian War Mission. The Order-in-Council then proceeded: "The chairman shall be empowered to represent the Cabinet and the heads of the various departments and other aministrative branches of the Government of Canada in respect to negotiations relating to purely Canadian affairs which it may be necessary to conduct—

(a) With the heads of the departments or other administrative branches, committees or commissions, or other officials, of the Government of the United States; or

(b) With the other British Allied Missions operating in the United States in connection with the war."

This Canadian War Mission was supposed to keep His Majesty's Ambassador informed concerning its activities and in turn, the Mission was entitled to be informed on all negotiations between His Majesty and the United States, in so far as they affected Canada. In form this Mission was not a diplomatic one, but its duties extended to questions classed under that head.

This Mission was only a makeshift for the duration of the war. Canada desired something more permanent, and with that end in view the question was discussed with the Government of Great Britain and with the United States. As a result, on May 10, 1920, the following memorandum was read in both the Canadian and the British Houses of Commons:[1]

"As a result of recent discussions an arrangement has been concluded between the British and Canadian Governments to provide more complete representation at Washington of Canadian interests than has hitherto existed. Accordingly, it has been agreed that His Majesty, on advice of his Canadian ministers, shall appoint a Minister Plenipotentiary who will have charge of Canadian affairs and will at all times be the ordinary channel of communication with the United States Government in matters of purely Canadian concern, acting upon instructions from, and reporting direct to, the Canadian Government. In the absence of the Ambassador, the Canadian Minister will take charge of the whole embassy and of the representation of Imperial as well as Canadian interests. He will be accredited by His Majesty to the President with the necessary powers for the purpose.

"This new arrangement will not denote any departure either on the part of the British Government or of the Canadian Government from the principle of the diplomatic unity of the British Empire.

"The need of this important step has been fully realized by both governments for some time. For a good many years there has been direct communication between Washington and Ottawa, but the constantly increasing importance of Canadian interests in the United States has made it apparent that Canada should be represented there in some distinctive manner, for this would doubtless tend to expedite negotiations, and naturally first-hand acquaintance with Canadian conditions would promote good understanding. In view of

[1] Revised Hansard, 1920, p. 2178.

the peculiarly close relations that have always existed between the people of Canada and those of the United States, it is confidently expected as well that this new step will have the very desirable result of maintaining and strengthening the friendly relations and co-operation between the British Empire and the United States.''

In 1920 the Canadian House of Commons voted $80,000.00 for the maintenance of Canadian representation in the United States. In 1921 this amount was reduced to $60,000.00 owing to the discontinuance of the War Mission, and the transference of the Press Bureau to the Trade and Commerce Department.[1] This item of $60,000.00 for representation in Washington led to a very interesting debate in the Canadian House of Commons, on April 21, 1921. Sir Robert Borden entered into a detailed explanation of the Minister's position, saying that it was quite apparent that the King's Minister, ''appointed on the recommendation of the Government of Canada is to be in confidential communication and in direct touch with the United States Government; that he shall report directly to the Government of Canada, and that every function which is ordinarily discharged by the British ambassador at Washington under present conditions in relation to Canadian affairs will be discharged in respect to those affairs by this minister acting in harmony and in co-operation with the British ambassador, but possessing a perfectly independent status so far as the affairs of Canada are concerned.''[2] Mr. Rowell described the function of the Minister Plenipotentiary as follows: ''He would take part in the negotiation of specific questions arising between the two governments—the Government of Canada and the Government of the United States—acting upon instructions from

[1] Hansard, LVI, p. 2484.

[2] Hansard, LVI, No. 45, p. 2471.

the Government of Canada, in the same way as a minister would who went down to deal with a specific matter. But in addition, he watches events; when necessary he makes representations to his own government as to the trend or source of events in order that they may anticipate difficulties; and by removing misunderstanding at the outset he may often prevent what would otherwise become a protracted point of difference. Then, he transmits to his government from time to time reports of legislation and executive acts. He keeps the Government here fully advised as to what is being done by the Government at Washington — that is a proper function of a diplomatic representative. He also furnishes such general reports as a diplomatic agent sends home with regard to social, industrial and economic questions that may be of interest to his government. He may negotiate treaties if he is instructed by his government to do so, either alone or assisted by a representative sent by his government to co-operate with him."[1] He also asserted that there would be no danger of friction between the British Ambassador and the Canadian Minister, because if controversies arose they would be referred to the home Governments for settlement.

While the agreement for the appointment of a Canadian Minister Plenipotentiary at Washington has been announced both in the Canadian and in the British House of Commons, no such Minister has been appointed. On April 21, 1921, the Prime Minister, Mr. A. Meighen, in answer to an inquiry as to why an appointment had not been made, replied: "There is one reason and one only, namely that the Government has not been able to decide as to the best man, and when I speak of that, I mean available to occupy this very important post." But he refused to table the correspondence in con-

[1] Hansard, LVI, No. 45, p. 2483.

nection with the agreement, saying it was a tripartite correspondence, and hence it was felt that it should not be made public by one of the Governments. The position of the Liberal Party was indicated by the resolution introduced in 1920. They moved that: "The House desires to record its opinion that before any arrangement respecting the permanent representation of Canada at Washington is consummated, the House should be fully informed concerning the negotiations between the Canadian, Imperial and United States Governments, and all correspondence and Orders in Council on the subject should be submitted to the House."[1] Speaking on this question the present Prime Minister, Mr. W. L. Mackenzie King, said, in April, 1921: "I for one feel that it is wholly in the interest of this country to have someone represent us in an official position at Washington, so that it may be possible for the Government of Canada to be informed from day to day from an authoritative source in regard to matters of concern to the two countries, and ministers of the Crown in Canada may acquaint Secretaries of State in the United States with and learn from them their views on matters of mutual concern. We have many questions of trade, immigration, industrial relations, international relations, on which we have much in common, and as regards which there are many considerations which both governments should take into account. While some years ago, perhaps, a step of the kind was unnecessary, I think that today, as our population grows, as the problems of the British Empire grow, as British ministers have more and more to attend to in connection with their own affairs, it is wholly in the interest of our country to have its own representation."[2] In view of the Liberal resolution quoted above, and the utterances of the present Prime Minister,[3] it is to be expected that correspondence

[1] Quoted, Hansard LVI, No. 45, p. 2492.
[2] Hansard LVI, No. 45, p. 2495.
[3] Hansard LVI, No. 45, p. 2492.

in connection with the appointment of a Canadian Minister Plenipotentiary at Washington will be tabled at the coming session of Parliament. Then, possibly, the reason why Canada has not exercised this newly acquired right of appointing a Diplomatic Representative will come to light.

36. The League of Nations and the International Court of Justice

In 1919, at Paris, Canada did not rest satisfied after she had won the right to participate in the negotiations of the Peace Treaty. She demanded that her newly won position be made permanent, and that she be included in any project of a League of Nations. In the first draft of the Government of the League, submitted by the League of Nations Commission, the position accorded to Canada did not meet with the approval of the Canadian Plenipotentiaries. They continued to press Canada's claims. Their efforts met with success and the Covenant as finally adopted fully recognized Canada's status.

Article One of the League of Nations Covenant provided that the signatories, named in the Annex, were to be original Members. Section I of the Annex lists the Members as follows:

ANNEX

Original Members of the League of Nations—

Signatories of the Treaty of Peace.

United States of America.

Belgium.

Bolivia.
Brazil.
British Empire.
  Canada.
  Australia.
  South Africa.
  New Zealand.
  India.
China.
Cuba.
  etc.

Much has been made of this form. It has been argued that the names of the Dominions were "spaced back" in order to show that the British Empire is the sole British member of the League of Nations.[1] The form might possibly sustain this opinion, but it is necessary to go deeper than form; the facts must be reached if one desires to obtain an accurate conception of Canada's status. The form employed is ambiguous, and for that reason it was criticised by the Canadian Plenipotentiaries.[2] They desired that the United Kingdom with the Crown Colonies and Dependencies should appear as one member, and that the Dominions each appear as a member. Their claim was pressed in Committee without success. In the form adopted the British Empire appears as one member, with the Dominions and India following. While the Canadian Government was unable to get its view recognized in words, it has been recognized in practice. The

[1] cf. Baty, "Sovereign Colonies," Harvard Law Review, June 1921.
[2] Hansard, Vol. LVI, No. 19.

description of the British Empire as a distinct member of the League has always been interpreted as meaning the United Kingdom with the Crown Colonies and the Dependencies.[1] In practical operation the United Kingdom is that particular member described as the "British Empire," while the Dominions have their membership, their representation and their say on a footing of equality with the United Kingdom. Even though the actual operation is in accord with the views of the Canadian Government, they regard the form as a misnomer which should be corrected at the first opportunity.[2]

In order to give greater weight to the Canadian interpretation of the form employed and in order to establish Canada's position as a full member of the League of Nations, Sir Robert Borden secured the following declaration from Premier Clemenceau, President Wilson, and Premier Lloyd George:[3]

"The question having been raised as to the meaning of Article IV of the League of Nations Covenant, we have been requested by Sir Robert Borden to state whether we concur in his view, that upon the true construction of the first and second paragraphs of that Article, representatives of the self-governing Dominions of the British Empire may be selected as members of the Council. We have no hesitation in expressing our entire concurrence in this view. If

[1] Hansard LVI, No. 19, p. 814.

[2] Hansard LVI, No. 19, p. 815.

[3] Sessional Paper 41J, Special Session 1919.

there were any doubt it would be entirely removed by the fact that the Articles of the Covenant are not subject to a narrow or technical construction.

Dated at the Quai d'Orsay, Paris, the sixth day of May, 1919. This declaration was incorporated in the records of the Peace Conference.

Canada's position of absolute equality was emphasized by the apportionment of the expenses of the Secretariat of the League. Article Six of the Covenant provides that "the expenses of the Secretariat shall be borne by the Members of the League in accordance with the apportionment of the expenses of the International Bureau of the Universal Postal Union." If, as Mr. Baty contends, the British Empire is the sole British member of the League of Nations, then one would expect that the Empire would bear the expenses of one member and that its share, according to the provisions of Article Six would be equal to the shares paid by any of the other large members—such as France, Italy or Japan. However the facts do not bear out this contention. Instead of the Empire being the sole British member of the League of Nations and paying as such, the United Kingdom, Canada, Australia, New Zealand, South Africa and India each pay as members. The amount paid by Canada is the same as the amount paid by the United Kingdom, France, or any other member rated in the first class by the Universal Postal Union.[1]

For the Fiscal year ending March 31st, 1920, Canada's

[1] Hansard LV, No. 78, p. 4096.

share of the expenses amounted to $64,000.[1] For the ensuing year it was $200,000; a like sum was voted in the Estimates of 1921 to cover the expenditure to March 21, 1922.[2]

Further facts confirm the interpretation that Canada is a member of the League of Nations. At the 1920[3] meeting of the Assembly in Geneva the representatives[4] of Canada occupied a place marked "Canadian Delegation."[5] The chairman of that delegation was elected as one of the six vice-presidents at large.[6] The Assembly of the League of Nations appointed six commissions; on each of these commissions every League member was entitled to one representative. A Canadian representative served on each commission.[7] The actions of the members of the League clearly demonstrated that they accepted Canada on a footing of equality.[8] Not only was Canada accepted as an independent member, but in her actions she showed that she regarded herself as such a member; she demonstrated that she was not subservient to any other power. Canada moved the elimination of Article X from the Covenant; when France, seconded by Great Britain, moved that the application of

[1] Hansard LV, No. 78, p. 4096.

[2] Hansard LVI, No. 44.

[3] See Hansard LVI, Nos. 3, 5, and 7. Also, New York Times, November-December, 1920, and the Official Report of the Proceedings of the first meeting of the League of Nations Assembly.

[4] The Canadian Representatives, Sir George Foster, Mr. C. J. Doherty and Mr. N. W. Rowell, were appointed to attend as representatives of Canada at the meeting of the Assembly of the League of Nations by Order-in-Council 2609, dated Oct. 26, 1920.

[5] Hansard LVI, p. 815.

[6] Hansard LVI, p. 118, and Proceedings of Assembly.

[7] Hansard LVI, p. 57.

[8] Hansard LVI, p. 200.

Albania for membership be refused, South Africa, seconded by Canada, moved that it be accepted. Albania was admitted.

In spite of the ambiguous form employed in the Covenant, Canada is a full member of the League of Nations. That is the view that was accepted by the "Big Three" and placed in the records of the Peace Conference. That is the interpretation which is accepted and acted upon by Canada and the other members of the League of Nations. Finally, Canada pays, and the League accepts her payment, as a member.

Article 14 of the League of Nations Covenant provided for the establishment of a Permanent Court of International Justice. As has been noted, plans for such a Court were formulated; and were ratified by the Council and Assembly of the League.[1] According to the protocol the members of the Court were to be elected by the Council and the Assembly of the League of Nations from a list of men nominated by the various groups, of four persons each, established as a result of the convention for the peaceful adjustment of international diffierences, which was agreed to at the Hague in 1899.[2] The plan further provided that any League member not a party to the Hague convention could appoint a national group for the nomination of Judges. Canada did this. Then, according to the provisions of the plan for the establishment of the Court this Canadian national group, as

[1] supra. p. 116.
[2] cf. Hansard Vol. LVI, No. 50.

well as the national groups of the other members, nominated four men each, two of whom were nationals and two of whom were not nationals. From this list of nominees the members of the League, including Canada, elected the Judges of the International Court. The jurisdiction of the Court extends to all members of the League. The provisions of Article 28[1] of the protocol extend to Canada, so that if Canada and Switzerland were disputants before the Court, Canada would have the right to choose one of her nationals to sit in the case before the Court. Canada, as a member of the League of Nations, has equal rights, in regard to the selection of judges and access to the Court, with all other members of the League.

37. Conferences

Canada's participation, as a political entity, in the Radiotelegraphic Conference, the Conference on Safety of Life at Sea, and the Paris and Versailles Peace Conferences has been noted.[2] Since then Canada has participated in several conferences. Of these the most important, from the point of view of emphasis of Canada's status, was the Interna-

[1] "Judges of the nationality of each contesting party shall retain their right to sit in the case before the Court. "If the Court includes upon the Bench a judge of the nationality of one of the parties only, the other party may select from among the deputy-judges a judge of its nationality, if there be one. If ther should not be one, the party may choose a judge, preferably from among those persons who have been nominated as candidates by a national group of the Court of Arbitration.

"If the Court includes upon the Bench no judge of the nationality of the contesting parties, each of these may proceed to select or choose a judge as provided in the preceding paragraph."

[2] See supra, Section 34.

tional Labor Conference held in Washington, October 29, to November 29, 1919.

Article 387 of the Versailles Treaty of Peace provided that the original members of the League of Nations should be original members of the International Labor Organization. Thus Canada, as a member of the League, became a member of the Labor Organization. Article 393 provided for a governing body of the International Labor Office and set forth the manner in which the twenty-four persons constituting that body were to be chosen.[1] The original draft of this article contained a provision that no high contracting party together with its self-governing Dominions should be entitled to more than one representative on the governing body.[2] Such a provision would have meant an impairment of Canada's status as a full members of the League. It would have implied her subserviency to the United Kingdom, because although the form employed in the Covenant of the League names the British Empire and although Canada is a Dominion in that Empire, nevertheless the fact

[1] "The governing body of the International Labour Office shall be constituted as follows:

Twelve persons representing the governments:

Six persons elected by the delegates to the Conference representing the employers;

Six persons by the delegates to the Conference representing the workers.

Of the twelve persons representing the governments eight shall be nominated by the members which are of the chief industrial importance, and four shall be nominated by the members selected for the purpose by the government delegates to the Conference, excluding the delegates of the eight members mentioned above.

Any question as to which are the members of the chief industrial importance shall be decided by the "Council of the League of Nations."

[2] Revised Hansard, March 11, 1920, p. 354.

is that the United Kingdom is the member described as the British Empire. If Canada had been refused the right of membership on the governing board because of her position within the British Empire that refusal, although based on form, would in fact have subjected Canada to the United Kingdom. Further it would have meant that Canada would have been ineligible to representation in the governing body, for the United Kingdom, being one of the eight members of chief industrial importance and acting under the formal title of the British Empire, would have representation and therefore Canada, as a Dominion in that Empire, would have been debarred. Because it was quite obvious that this restrictive clause would detract from the status and position of Canada, Sir Robert Borden objected to it most strenuously. The result was that the clause was eliminated, only however, "after the greatest pressure on the part of the representatives of Canada and the other Dominions."[1] The treaty as adopted did not contain the objectionable clause and thus Canada's status as a full member of the League and of the Labor Organization remained unimpaired.

When the International Labor Conference met in Washington, Canada was one of the thirty-four countries represented. The Canadian representatives were received on a footing of equality by the representatives of the other members; they took an active part in the proceedings. After the eight members of chief industrial importance had been designated for representation on the Council it became necessary to elect the remaining four members who were to

[1] Mr. N. W. Rowell, Revised Hansard, March 11, 1920, p. 354.

be represented. Canada was selected as one of the four.[1] Further, of the six persons elected by the delgates to the conference representing the workers, one was a Canadian Labor delegate. Thus Canada was accorded a representation that would have been denied her had the proposed restrictive clause been embodied in Article 393 of the Treaty of Peace. The action in regard to the establishment of the Labor Organization and the election of its council clearly demonstrates the fact that Canada is a full member of the League of Nations and of the Labor Organization, and that she is regarded as such by the other members.

Canada also has participated in subsequent conferences such as the Spa Conference and the Washington Conference for the Limitation of Armaments. In this latter conference, in spite of the flurry and dissatisfaction caused by the non-issuance of invitations to the Dominions, a Canadian representative, appointed by a Canadian Order-in-Council, sat throughout the proceedings and signed the various agreements for the Dominion of Canada. The position taken by Canada at Washington in no way impared Canada's right to separate representation. That the Government of Canada intends to continue this policy of independent representation at International Conferences is shown by the fact that they have accepted the invitation to the proposed Genoa Conference and have appointed two Canadians to participate in the Conference on behalf of Canada.

[1] Mr. Rowell, Revised Hansard. March 11, 1920, p. 354:
"The House will be gratified to know that, by a vote of the representatives of the world assembled in Washington, Canada was..... chosen."

What do these activities of Canada signify? Concerning the Canadian signatures to treaties Mr. Baty propounds the following delightful theory: "It is really difficult to see what is the grammatical sense of this phraseology. What is the meaning of a principal being represented by A. for Z.?

"Of course the underlying truth is that the old conception of sovereignty has gone by the board. But we are not dealing, and the treaty was not dealing, with underlying truths, but with definite legal conceptions. And so long as a single individual allegiance to the person of the King is the theory of British constitutional law, the engagements of the King must be made in accordance with the theory. Two courses alone seem open to the interpreter.

"Either the mention of signature "for" the colonies was ornamental only, or there is no longer a single individual allegiance throughout the British dominions.

"The former course seems the preferable one. Signature by A. on behalf of N. "for" Z. may, without straining language beyond the bounds of possibility, be supposed to mean "in honour of" Z. So in America one "names" a child "for" a relative, or a battleship "for" a city. This would certainly be the interpretation adopted if a plenipotentiary had signed on behalf of the King "for Scotland." "The alternative," he says, "is a very serious one. It is that the British Empire has broken up. If the King's plenipotentiaries sign 'for Canada' and thereby bind Canada and Canada only, it is clear that a new state, semi-sovereign at least, and probably wholly sovereign, has joined the family of nations."[1] The action of Canada in participating in the negotiation of the treaty, in signing that treaty and in later approving it shows beyond a doubt that the "mention of signature 'for' the colonies" was not ornamental only. Neither has Mr. Baty's alternative, that "there is no longer a single individual allegiance throughout the British Domin-

[1] Baty, "Sovereign Colonies," Harvard Law Review, June, 1921.

ions,'' become a fact. There is a single individual allegiance, but that allegiance is to the King, not to Great Britain or the Parliament of Great Britain.

The international activities of Canada show beyond a doubt that she has been accepted into the organized ''Family of Nations,''[1] as a Dominion of the British King. The fact that such Dominions have international obligations has been recognized.[2] Canada has accepted her international obligations and by her actions has demonstrated her sincere intention to observe them.

Canada is not a sovereign state; she is a part of a larger state. But she has an international position as a part of that state,[3] as a part of the territories of the British King.

[1] Oppenheim, L. ''International Law'' (1920 Edition, Notes prepared by the author before his death. Book edited by Mr. R. F. Roxburgh.) p. 269. ''Taking this into consideration, the conclusion is obvious that the League of Nations is intended to take the place of what hitherto used to be called the Family of Nations, namely the community of civilized States, for the international conduct of which International Law has grown up.'' And on p. 270: ''As already stated, in its essence the League is nothing else than the organized Family of Nations.''

cf. Hansard Vol. LVI. No. 50, p. 2824, Mr. Doherty: '' I can point the hon. gentleman to discussions where Canada was not present at all, and where some of the greatest jurists of Europe laid it down as a matter that does not suffer discussion that the Dominions stand in the position of distinct states, in regard to the League of nations at all events. However mistaken they may be, they believe that and act upon it.''

[2] Article 1 of the Treaty and Covenant says in part: ''Any full self-governing State, Dominion or Colony not named in the Annex may become a Member of the League if its admission is agreed to by two-thirds of the Assembly, provided that it shall give effective guarantees of its sincere intention to observe its international obligations, etc.''

[3] cf. Hansard, LVI. No. 7, p. 200, Mr. Doherty: ''I have made no suggestion that Canada or any one of the other Dominions is a nation outside the British Empire.''

This position of Canada is not in accordance with the rules of International Law as developed up to 1914.[1] It is difficult to reconcile that position with precedent; new conditions

[1] Sections 94a and 94b of Oppenheim, "International Law," 94a: "Formerly the position of self-governing Dominions, such as Canada, Newfoundland, Australia, New Zealand, and South Africa, did not in International Law, present any difficulties. Then they had no international position whatever, because they were, from the point of view of International Law, mere colonial portions of the mother country. It did not matter that some of them, as, for example, Canada and Australia, flew as their own flag the modified flag of the mother country, or that they had their own coinage, their own postage stamps, and the like. Nor did they become subjects of International Law (although the position was somewhat anomalous) when they were admitted, side by side with the mother country, as parties to administrative unions, such as the Universal Postal Union. Even when they were empowered by the mother country to enter into certain treaty arrangements of minor importance with foreign states, they still did not thereby become subjects of International Law, but simply exercised for the matters in question the treaty-making power of the mother country which had been to that extent delegated to them.

94b. "But the position of the self-governing Dominions underwent a fundamental change at the end of the World War. Canada, Australia, New Zealand, South Africa, and also India were not only separately represented within the British Empire delegation at the Peace Conference, but also became, side by side with Great Britain, original members of the League of Nations. Separately represented in the Assembly of the League, they may, of course, vote there independently of Great Britain. Now the League of Nations is not a mere administrative union like the Universal Postal Union, but the organized Family of Nations. Without doubt, therefore, the admission of these four self-governing Dominions and of India to membership gives them a position in International Law.

"But the place of the self-governing Dominions within the Family of Nations at present defies exact definition, since they enjoy a special position, corresponding to their special status within the British Empire as 'free communities, independent as regards all their own affairs, and partners in those which concern the Empire at large' (Viscount Grey in the Times (London) January 31, 1920). Moreover, just as, in attaining to that position, they have silently worked changes, far-reaching but incapable of precise definition, in the Constitution of the Empire, so that the written law inaccurately represents the actual situation, in a similar way they have taken a place

have been met by new precedents.[1] As a Dominion of the British King Canada has been recognized internationally as having international obligations; she has been recognized as a person in international law. As such she has been accepted on a footing of equality by almost all the states comprising the Family of Nations.

within the Family of Nations, which is none the less real for being hard to reconcile with precedent. Furthermore, they will certainly consolidate the position which they have won, both within the Empire and within the Family of Nations. An advance in one sphere will entail an advance in the other. For instance, they may well acquire a limited right of legation or limited treaty-making power. But from this time onwards the relationship between Great Britain and the self-governing Dominions of the British Empire is not likely to correspond exactly to any relationship hitherto recognized in International Law unless the British Empire should turn into a Federal State.''

[1] cf. Sir Robert Borden's telegram, supra, p. 125.

CHAPTER V

STATUS

38. Intra-Imperial

In determining Canada's status both form and substance must be taken into consideration. If only the former needed to be considered the matter would be quite simple. Canada would be classed as a Colony. According to legal form the King by and with the advice of the Parliament of the United Kingdom is supreme. According to form the Parliament of Canada is a mere non-sovereign body which has been given the right to legislate for various purposes; its will is subject to the will of the Parliament of the United Kingdom, from which all power emanates. Then the terms "Dominion" and "Colony" would be synonymous and the only reason for using the former in preference to the latter would be to satisfy the *armour propre* of the large self-governing colonies.

On the other hand, consideration of substance to the exclusion of legal form would lead to the other extreme.

Legislation enacted by the Canadian Parliament, declarations made by the Canadian Government stating that Government's intention to act independently of the wishes of the United Kingdom, and finally, action taken by Canada on various occasions would lead to the deduction that actually Canada is an independent state and that the relations between Canada and the United Kingdom are similar to those of a personal Union or an Association of Nations. If substance alone received consideration then truly the result would be serious; it would mean that the British Empire had been disrupted.[1]

Both of these deductions would be erroneous. Canada is not subservient to the Parliament of the United Kingdom. Neither is Canada an independent state. The decisions to which a consideration of form or of substance would lead, would be incorrect. It is only by paying due regard to both and by following the criterion of constitutional practice that an accurate conception of Canada's status can be formed.[2]

Canada has discarded colonial status, but Canada is not an independent state. Neither is Canada, within the Empire, on a footing of absolute equality with the Mother Country. As Mr. Keith points out,[3] only a few alterations would be

[1] cf. Baty, "Sovereign Colonies."

[2] Dicey, p. lxxxvi, says: "My full belief is that an Imperial constitution based on goodwill and fairness may within a few years come into real existence, before most Englishmen have realized that the essential foundations of Imperial unity have already been firmly laid. The ground of my assurance is that the constitution of the Empire may, like the Constitution of England, be found to rest far less on parliamentary statutes than on the growth of gradual and often unnoted customs."

[3] Keith, "Imperial Unity."

needed to make the British Commonwealth of Nations a legal fact, to bring into existence the system for which Sir Robert Borden labored so strenuously, a system of free, equal, nations united in one Commonwealth. In order to bring that about, present practice would have to be definitely established; the Governor-General would have to be appointed solely on the advice of the Canadian Government without the necessity of any action by the Government of the United Kingdom; appeal to the Judicial Committee of the Privy Council would have to be abolished, or that body would have to be altered in such a way as to make it representative of the whole Empire and its powers would have to be extended to make it a Supreme Court for all parts of that Empire; and as far as Canada is concerned, she would have to avail herself of the privilege of amending the fundamental written part of her constitution. Then there truly would be a "galaxy of nations under the British Crown."[1] But these legal changes have not been made and, within the Empire, Canada in several respects is not absolutely on a footing of equality with the United Kingdom.

That the Dominion Prime Ministers realized this is shown by the Constitutional Resolution of the Imperial War Conference, 1917. That resolution suggested the summoning of an Imperial Constitutional Conference to consider the constitution of the Empire, to remove anomalies from it, and to establish existing practice. That Conference has not been held, the constitution of the Empire has not been formally altered, the desired British Commonwealth of Nations has

[1] This phrase used by Sir Wilfrid Laurier in the Canadian House of Commons, 1907.

not become a legal entity. Facts show that the Dominons and the United Kingdom are not actually equal within the Empire. The part played by the Government of the United Kingdom in the appointment of a Governor-General and in the conduct of "high politics," appeal from Dominion Courts to the Judicial Committee of the Privy Council of the United Kingdom, are all instances, however small, of the fact that absolute equality is not an actuality. As Professor Keith aptly states: "The view that the self-governing Dominions are sister nations of the United Kingdom has been expressed both by Mr. Lyttelton and Mr. A. J. Balfour, but neither rhetoric nor philosophy must blind us to law and fact. Doubtless equality and fraternity are the ideals to be aimed at, but the mode of their realization is the fundamental problem of Imperial relations at the present day."[1]

Canada has advanced from a colonial status. She has not arrived at a status of complete legal independence, nor of one of actual equality with the United Kingdom, within the Empire. Canada is travelling along the road toward one of these destinations.[2] At present she enjoys the status of a Dominion[3] — as distinguished from that of a Colony, a State or a Nation actually equal with the United Kingdom

[1] Keith, "Imperial Unity," p. 7.

[2] That is, presupposing that Imperial Federation is dead.

[3] Baty criticises Dominion thus: "It is constantly being confused with 'dominion' in the wide and proper sense of territorial possession." That is exactly the sense in which "Dominion," as a proper noun applied to Canada, is used,—to designate his Majesty's Canadian territorial possession. In this wide and proper sense it would be correct to refer to the English, Scotch or Irish territorial possessions of His Majesty as his English or Scotch or Irish Dominions.

within the Empire. As such a political entity, what is Canada's status?

As far as internal government is concerned, all restrictions placed upon the Canadian Parliament in favor of the United Kingdom have been done away with. What legal power the Parliament of the United Kingdom retained has been restricted by constitutional practice. The Canadian Government has refused to carry on the Government for the benefit of the United Kingdom and has declared that its only responsibility is to the electorate of Canada—the political sovereign in Canada. The Parliament of Canada has the right to legislate on any subject no matter how much their legislation might differ from that of the Parliament of the United Kingdom. By their actions both the Canadian Government and the Canadian people have shown beyond a doubt that Canada is politically sovereign. Constitutional practice, through the formation of customs of the constitution, enables political sovereignty to control legal sovereignty. In the case of Canada constitutional practice has restricted the legal power possessed by the Parliament of the United Kingdom. According to constitutional practice Canada as a political entity possesses internal political sovereignty.

Nevertheless that Dominion is a part of a larger state—Canada is a part of the British Empire, over which there is one King. In form Canada is a part of the King's dominion; it is his Canadian Dominion. The larger British state, of which Canada is a part, developed from the possessions of the King of England. His English Kingdom[1] expanded into

[1] The words Kingdom and Dominion both signify territory over which a person has supreme authority.

a Kingdom embracing England, Scotland and Ireland; it grew into an Empire with Colonies and Dependencies. Then changes occurred. Some Colonies were lost, while others remained to develop under the British Crown. Theoretically there is one sovereign power throughout the Empire. This sovereign power is exercised by the King upon the advice of his constitutional advisers. For years the King had only one group of advisers,—the Government of the United Kingdom. As other parts of the Empire developed Governments distinct from the Government of the United Kingdom, those parts naturally demanded that their voice also be heard in advising the King in the exercise of the sovereign power over that part. These parts demanded a status of equality with the original part out of which the larger state had grown. The Overseas Dominions maintained that their size, their wealth, actual and potential, their population and their strength no longer permitted them to be subject to the original part of the Empire,—the United Kingdom, but that they had now reached the point where they should be accepted on a footing of equality with the United Kingdom in advising the King. The sovereign power within the British Empire was no longer to be controlled by just a part of the King's territorial possessions, but all the parts that had reached a certain stage of development should share in that control. Each part should advise the King in the exercise of the sovereign power over that part.

Theoretically there is one sovereign power throughout the Empire. For a time the sovereign power over Canada was exercised legally and constitutionally by the Parliament of the United Kingdom. But just as the people of Great Britain asserted their right to exercise the sovereign power

in Great Britain, so the people of Canada have asserted their right to exercise the sovereign power in Canada. Constitutionally the sovereign power in Canada is exercised by His Majesty, by and with the advice of his Canadian Ministry—the Canadian Cabinet. But the sovereign power in Canada having been legally transmitted through the Parliament of the United Kingdom, and all traces of that legality not having been eliminated, the Canadian Government in form derives its powers from the Parliament of the United Kingdom. So long as traces of this transmission of power remain, Canada will not be on an actual footing of equality with the United Kingdom.

Within the Empire, Canada and the United Kingdom are not equal. An alteration of legal form would be necessary to make them so; however, constitutional practice has so restricted legal power as to make them almost equal.[1] The second attribute of Canada's status is that within the empire

[1] Hansard, LVI, No. 2, p. 10. Mr. W. L. Mackenzie King (Prime Minister): "My right hon. friend," (Mr. A. Meighen, the Leader of the Opposition, and former Prime Minister) "yesterday, referring to the proceedings of this Conference," (the Imperial Conference of 1921) "stated that certain of them were secret and asked me to communicate with the Prime Minister of England in order to find out what part, if any, of the secret proceedings he would be at liberty to disclose. A good deal has been said by my right hon. friend in regard to the equality of status of the different countries comprising the British Empire. I would say that I see no necessity for our asking Great Britain what he may do in reference to any conference of Prime Ministers. As I look at the proceedings I find that representatives of Australia, New Zealand, South Africa and India were present, and I should think there would be quite as much reason for communicating with Australia and South Africa as with Great Britain in regard to what part of the proceedings should be made public in this Parliament. There is equal reason also to ask the Government of this country what its view is as to the proceedings and what action should be taken with respect to regarding any part

she is virtually on a footing of equality with the United Kingdom.

These virtually equal entities, under a common theoretical sovereignty, maintain unity through co-operation. As long as all the parts co-operate the Empire stands as a whole. Action to be constitutionally binding upon the whole Empire must be taken by the King upon the advice of all his Ministers. Should any part of the Empire refuse to concur in action taken, that would commit the dissenting part to such an independent position that it could no longer be considered as co-operating with the rest of the Empire.

This development of the constitution of the Empire is founded on the rock of responsible self-government,[1] — on the principle that a group of people inhabiting a defined territory have the right to govern themselves, and that the Government which they establish should at all times be responsible to them and to them alone. That is the principle adhered to by Canadian statesmen. The application of this principle has led to the establishment of a number of practically independent and virtually equal Governments on a

of them as private. I may say to my right hon. friend that this is a public document and that he or any other hon. member of this House is at liberty to quote any part of it. In regard to any proceedings that were secret, I have no doubt that my right hon. friend was a party to any arrangement that was made as to the secrecy of the proceedings and he must use his own judgment as to what he will disclose or withhold in regard to that part of the Conference.'' And, again, ''I wish to make my position perfectly clear. I simply take the ground that the Conference of Prime Ministers was a conference of the representatives of different countries, all of which were met on a basis of equality. For that reason I do not propose to return to the colonial status so far as this country is concerned, by asking permission to quote from the report.''

[1] cf. Mr. W. L. Mackenzie King, Hansard, Vol. LVI, No. 49, p. 2723.

territory over which there is one theoretical sovereignty. Through co-operation those Governments maintain the unity of that theoretical territorial sovereignty. Without co-operation that theoretical sovereignty and that appearance of unity would disappear and those Governments would stand as the Governments of independent sovereign states.

The importance of the King's position in the governance of the British Empire can be fully appreciated when it is realized that government throughout the Empire is carried on in his name. Theoretically there is one sovereignty throughout the Empire. That sovereignty is exercised by the King by and with the advice of his constitutional advisers. The King remains the same for the whole Empire, but a different body of men constitute the constitutional advisers in each part. It is through this single kingship that the parts of the Empire, while internally sovereign and virtually equal are enabled to hold together.

39. International

In considering Canada's international status, recognition of the King's position is likewise important. He is the Sovereign; theoretically he is the personification of the state. It is he, with the advice of his constitutional advisers, who sends and receives ambassadors, who declares war, who negotiates treaties, and who declares peace. This action is legally binding on the whole Empire. When the King had only one group of advisers they exercised those powers, they acted for all His Majesty's territorial possessions. They

appointed ambassadors, they advised the declaration of war, they conducted the negotiation of treaties, and they advised the declaration of peace. They did all of these things for the whole of the Empire. Thus the whole was bound by the actions of a part. As the constitution of the Empire developed, as separate Governments arose within the Empire, those Governments refused to be put under obligations by only one of the Governments. They demanded a share in the negotiation of treaties. The representatives of those independent Governments met the representatives of the Governments of sovereign states on a footing of equality. Internationally the actualities were recognized. Although legally the territory is one and there is one theoretical territorial sovereignty throughout the British Empire, other states realized that the Government of each part of the King's territorial possessions was the only power that could effectively enter into obligations for that part. The parts became individual members of the League of Nations, separate members of the Labor Organization, distinct entities within the jurisdiction of the Permanent Court of International Justice and signatories of the treaties resulting from the Washington Conference for the Limitation of Armaments. The criterion followed was not one of territorial or legal independence, but rather one of political independence.

Owing to the fiction of a Sovereign King the various parts of the Empire were enabled to act as practically independent states while maintaining the appearance of the unity of the whole, while preserving a single territorial sovereignty. The King declares peace upon the advice of his various Governments. All must concur and must be willing to accept the

results that the King's declaration might entail, or if it is unwilling to do so the dissenting part must become a separate state. Inferentially it has been argued that a declaration of war to be constitutionally binding throughout the Empire must be made upon the advice of all the Governments. But that principle has only been enunciated, it has not received sanction sufficient to establish it as constitutional practice. However it is an established eustom of the constitution that in the case of Canada the decision whether or not she will participate in an Imperial war rests with Canada. Canada is not bound to participate in an Imperial war, but as long as she remains a part of the Empire legally she would be subject to attack and legally, for the purpose of indemnity or annexation, a victorious enemy could consider Canada, whether she participated in the war or not, as a part of the Empire. Thus although Canada did not advise the declaration of war, and although constitutionally Canada is not obliged to wage war, legally she would be considered as having tacitly concurred in the declaration unless she took action to discard the legal bond connecting her to the Empire and to have herself recognized as a sovereign state. No part of the Empire may, in case of war, remain a part of the Empire and at the same time demand neutral rights. They must be willing to accept all the results that might ensue from a declaration of war, or they must set themselves up as separate states.

It is the king who, upon the advice of his constitutional advisers, sends ambassadors. Until a few years ago one of his Governments advised in the appointment of those ambassadors. Now Canada has obtained the right to advise in the exercise of this power. Theoretically the ambassador or

minister who is appointed by the King's constitutional advisers, represents the King. Actually he represents the Government appointing him. In form the Canadian Minister to Washington is to be His Majesty's Minister Plenipotentiary. Actually he will represent the Dominion of Canada. Thus through the kingship Canada, while remaining a part of the Empire, will be enabled to have a Minister Plenipotentiary at Washington.

In the international field the position of the King is very important. It is through the kingship that unity is preserved internationally. It is through the constitutional practice that sovereign power throughout the Empire is exercised by the King by and with the advice of his Governments that those various Governments are enabled to be practically independent and that the various Dominions are enabled to obtain a position in international law without possessing territorial sovereignty. The King, upon the advice of his Ministries, enters into obligations which bind all his subjects and all his territorial possession. These Ministries differ for different parts of the Empire. Actually it is the Government of each Dominion that binds the Dominion. The actualities have been recognized, internationally, although the old form has been retained.

The Empire is one territory under one theoretical sovereignty, but on this territory have arisen five Governments practically independent of one another, and virtually equal. These Governments conduct general foreign affairs as a unit in the name of the King, who is the personification of the state. They also conduct their individual foreign affairs in his name. Each Dominion possesses an international identity only as a part of the Empire. If Canada had an international

position independent of her position within the British Empire—she would be a free, independent, sovereign state. Canada is not such a state, nevertheless the facts show beyond a doubt that it has been recognized that Canada can only be bound by her own Government. Canada has been recognized internationally as a Dominion of the British King. Internationally it has been recognized that within the territorial possesions under His Britannic Majesty there are a number of practically independent and virtually equal Governments. Each of the parts governed by those various independent Governments has been accepted as having an international status and as possessing international obligations and rights.

Canada as a political entity possesses internal political sovereignty and, within the Empire, she is virtually on a footing of equality with the United Kingdom. Internationally it has been recognized that only the Parliament of Canada can actually bind Canada, and thus Canada as a part of the British Empire, has been given an international status, she has participated in the negotiation and ratification of treaties and in the declaration of peace. Within the League of Nations Canada is accepted as an equal by the members, and, finally, it has been recognized that Canada as a political entity has international obligations and rights.

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VITA

The author of this study was born in Kitchener, (at that time Berlin), Ontario, Canada, on September 29, 1897. He attended the Public Schools and the Collegiate Institute of that city, obtaining his Junior Matriculation, (Province of Ontario) in 1914, and Honor Matriculation, (Province of Ontario) in 1915. His undergraduate work, which was interrupted by one and one half years' service in the C. E. F., was done in Gettysburg College, (at that time Pennsylvania College), from which institution he received the degree of Bachelor of Science, in 1919. In July, 1919, he entered Columbia University as a graduate student; he attended the summer session of that year. For the next scholastic year he served as Instructor in French and in Political Science at Gettysburg College, and in 1920 he received the degree of Master of Arts from that institution. In the summer of 1920 he returned to Columbia University, taking graduate work under the Faculty of Political Science during the summer session of 1920, and during the scholastic years 1920-21 and 1921-22.